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No. 08-1249

Supreme Court, U.S.
FILED
APR 7 - 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,
ex rel. THORNTON G. SANDERS,

Petitioner,

v.

NORTH AMERICAN BUS INDUSTRIES, INC.;
DELOITTE & TOUCHE USA, LLP;
NORTH AMERICAN BUS INDUSTRIES KFT.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent NABI performs final assembly of transit busses using bodies produced in Hungary. NABI falsely claimed the bus shells had enough additional components to qualify for "duty free" entry as finished buses while at the same time qualifying for "Buy America" subsidies by falsely claiming to the Department of Transportation that 60 percent of the component value was added in the United States. The court of appeals imposed a materiality requirement not found in the False Claims Act and imposed an impossible burden requiring a relator to prove what Customs would have done in the absence of the false claims. The court applied the short six-year statute of limitations even though the government had no knowledge of the false claims prior to relator's complaint.

1. The statute of limitations for actions under the False Claims Act ("FCA") is the later of (1) six years after the false claim, or (2) ten years after the FCA violation when an action is filed within three years after the government learned of the underlying false claims. Was Petitioner Sanders permitted to rely on the ten-year limitations period when the government had no knowledge of the facts and chose to allow Sanders to litigate on its behalf?

QUESTIONS PRESENTED – Continued

2. This case involves the Customs classification of imported bus shells where Customs stated that the classification was governed by the "substantial amount of equipment and components" represented to be on the bus shells by the Respondents. The Respondents lied about the equipment and components contained on the bus shells to obtain a more favorable classification and to avoid paying Customs duty. Were such lies "material" to Customs' classification decision?

3. Whether, under this Court's analysis in *United States v. Wells*, 519 U.S. 481 (1997), and *Neder v. United States*, 527 U.S. 1 (1999), the FCA contains a materiality element.

4. Whether this Court's decision in *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409 (2005), regarding the appropriate statute of limitations for retaliatory discharge claims filed under 31 U.S.C. § 3730(h) of the FCA should be overruled.

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OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals (App. 1) is reported at 546 F.3d 288 (4th Cir. 2008). One decision of the district court is unreported but available at 2007 WL 80922. App. 34. Three other decisions of the district court are unreported and not available electronically but are appended at App. 30, App. 42 and App. 46.

JURISDICTION

The order of the Court of Appeals for the Fourth Circuit denying petitioner's motion for rehearing en banc was entered on January 7, 2007. App. 49. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the False Claims Act, 31 U.S.C. §§ 3729-3731, are set out in the appendix to this petition at App. 51.

STATEMENT

The *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733 permit private parties to bring suit in federal court to recover treble damages and penalties on behalf of the United States. This Petition presents two questions of considerable importance regarding the application of the FCA. First: is the statute of limitations in "non-intervened" cases six or ten years? Second: does the FCA silently impose a materiality requirement, and if so, what is the proper standard? On both of these issues the lower courts have issued diverse opinions. Legislation has been introduced in Congress which would resolve both of these issues by: (1) creating a uniform statute of limitations for all causes of action under the FCA; and (2) explicitly stating that the FCA is a statutory cause of action and that no additional elements, such as materiality, are required to prove liability. With regard to the appropriate statute of limitations for retaliatory discharge claims filed under § 3730(h), the Court should review its decision in *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409 (2005), because of the inequitable and inconsistent treatment accorded whistleblowers resulting from the application of this decision.

A. Background

The Respondents, North American Bus Industries, Inc. of Anniston, Alabama, and its Hungarian parent, North American Bus Industries, Kft. (collectively

"NABI") are in the business of producing transit buses for American transit authorities. *See generally* App. 3-4. NABI engages in a two-step manufacturing process. It first produces bus shells or bodies in its plant in Hungary and then, using American components, completes the assembly of the buses in the United States. *Id.* In doing so, it certifies that the buses qualify for Buy America grants or subsidies under 49 U.S.C. § 5323(j) and 49 C.F.R. Part 661, which require that "the cost of components and subcomponents produced in the United States is more than 60 percent of the cost of all components. . . ." 49 U.S.C. § 5323(j)(2)(C)(i). *Id.*

B. NABI's False Claims

In the process of importing its bus bodies from Hungary for use in the production of finished buses, NABI made three different types of false claims actionable under the FCA. First, NABI Hungary undervalued the bus bodies by falsely claiming that it provided valuable engineering and technology ("E&T") services to NABI USA. It billed NABI USA for these non-existing services, thereby reducing the cost of the foreign content of the finished bus and allowing NABI's buses to qualify for Buy America subsidies. Since the actual domestic content of the finished buses was less than 60 percent for many of the buses, NABI was not qualified to receive any part of the subsidy. Second, since the payments were not declared to the U.S. Customs Service, now U.S. Customs and Border Protection, ("Customs"), NABI

avoided the payment of Customs duties on the E&T payments.

Finally, in a successful effort to eliminate the payment of all Customs duties on imported bus shells, NABI, with the assistance of Respondent Deloitte & Touche, LLP ("Deloitte"), falsely claimed that they were sufficiently complete to be classified as duty-free finished buses. NABI made the opposite representation to the Federal Transit Administration to obtain "Buy America" subsidies, i.e. that 60 percent of the value of the components of finished busses was added in the United States.

Petitioner Sanders was the Chief Financial Officer and President of NABI USA from 1993 until April 1997. App. 6. His employment was terminated by his Hungarian based superiors after he raised questions about the legality of the undervaluation of the imported bus shells.

C. Facts Related to the Statute of Limitations

Petitioner Sanders filed his original complaint on September 17, 2002. That complaint contained only one count alleging false claims made to obtain Buy America subsidies. The complaint also contained allegations that Mr. Sanders was wrongfully discharged, but did not contain a formal count regarding that discharge. After the Government declined to intervene in the original complaint Mr. Sanders filed an amended complaint on June 23, 2004, adding two Customs' counts and a retaliatory discharge count

filed under 31 U.S.C. § 3730(h). On March 7, 2005 the district court denied NABI's motion to dismiss Sanders' Customs' counts and his wrongful discharge claim on statute of limitations grounds. App. 46. The court found that false claims made to Customs were actionable under the FCA and that Sanders' discharge claim related back to his original complaint, and that they were thus within the six-year statute of limitations for such claims. *Id. See United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 367 F.3d 245 (4th Cir. 2004). Subsequently, after conducting initial discovery and learning of Respondent Deloitte's role in the Customs classification fraud, Sanders amended his complaint to add Deloitte as a defendant on June 30, 2005.

On December 19, 2005, the district court granted Deloitte's motion to dismiss the complaint against it on statute of limitations grounds. App. 42. The district court found that in a non-intervened case Sanders was entitled to only a six-year statute of limitations instead of the ten-year period if the government had intervened in his action.

The objective of NABI's Buy America scheme was to fraudulently obtain substantial subsidies for finished buses by understating the value-added in Hungary in order to comply with Buy America requirements. The district court initially found that Sanders could not show that the government sustained actual damages under the test established by the Fourth Circuit decision in *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352

F.3d 908 (4th Cir. 2003). App. 46. The district court entered judgment on the issue of damages, but held that NABI could still be subject to penalties under the FCA. The false claims related to the Buy America fraud all occurred before 1996 and more than six years before Sanders filed his original complaint. Subsequently, the court dismissed all of these allegations on statute of limitations grounds. App. 30. The court of appeals affirmed the district court solely on the basis of the statute of limitations decision. App. 18. Thus, the issue of damages was not addressed by the court of appeals.

As noted, Sanders' First Amended Complaint contained a retaliatory discharge claim filed under § 3730(h) of the FCA. That allegation was ultimately dismissed by the district court (App. 26 n.6) following the Court's decision in *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409 (2005), which reversed a prior decision of the Fourth Circuit Court of Appeals. On September 12, 2007, technical amendments were introduced in the Senate that would overrule *Graham County*. These amendments were reintroduced in the Senate on February 24, 2009. In the interest of preserving his rights, Sanders appealed the dismissal of his discharge claim in the event that the proposed amendments become controlling law.

D. Facts Related to Materiality

For many years before 1998, NABI imported bus shells from Hungary into the United States under subheading 8707.90.50 of the Harmonized Tariff Schedule of the United States ("HTSUS"), dutiable at 4 percent of their declared value. This provision provides for "Bodies (including cabs), for motor vehicles of headings 8701 to 8705: Other:, Other." On June 29, 1998, Deloitte & Touche filed a protest on behalf of NABI with Customs challenging the classification of the bus shells as "bodies." The protest claimed refunds of customs duties on past shipments of bus shells. NABI asserted that the bus shells should be classified under subheading 8702.10.30, which provides for "Motor vehicles [with diesel engine] designed for the transport of [16] or more persons including the driver." The rate of duty under this provision was 2.4 percent during 1997 and was subsequently reduced to 2 percent. More importantly, NABI imports from Hungary classified under this provision were eligible for Generalized System of Preferences ("GSP") treatment, which made them duty free. NABI falsely claimed that a number of components were imported with the bus shells – *when they were not* – to obtain the duty-free classification. The evidence proves beyond any genuine dispute that many of the key components claimed to be imported with the bus shell – components that could theoretically result in the classification of the imports as finished buses – *were not complete or not even imported with the shell at all.*

Customs granted the protest on November 20, 1988, finding explicitly:

> The bus shells when imported *contain a substantial amount of equipment and number of components necessary for a completed transit bus*. . . . Accordingly, the bus shells are classified as motor vehicles for the transport of 16 or more persons, including driver; since, in its unfinished state, the article has the essential character of such a motor vehicle. (emphasis added)

U.S. Customs Priv. Ltr. Rul., HQ962065 (Nov. 20, 1998)

Thus, when Customs granted NABI's claim for a refund of duties it stated that its decision was based on the "substantial amount of equipment and number of components" claimed in the protest. The Government declined to intervene following the filing of Sanders' First Amended Complaint, which added his Customs related counts and his retaliatory discharge claim. However, after reviewing the papers and supporting exhibits filed in connection with the parties' cross motions for summary judgment, the Government sought additional time from the district court to consider those documents and reevaluate its intervention decision before the court rendered its rulings on summary judgment. The court denied that request in its summary judgment order in which it found that NABI's false claims were not material to the Customs' classification decision. App. 37-40. Independently, without informing Sanders at the time, the Government began an investigation of NABI's continuing bus shell imports, and as a result,

reclassified the bus shells from finished buses to bus bodies. Sanders became aware of this investigation and reclassification while the appeal was pending. Sanders requested the Fourth Circuit to take judicial notice of the Government's affidavit used to secure a search warrant of NABI's facilities, which detailed the Government's position.[1] App. 56. In affirming the district court's materiality decision, the court of appeals denied this request. App. 27. The affidavit filed in support of the search warrant stated that NABI's misrepresentations regarding the components included in the bus shell were "material" to Customs' classification decision.

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[1] Based on the time line contained in the Government affidavit, it is quite clear that NABI was aware that Customs had in fact changed the classification of its bus shells prior to the time that the district court entered judgment and before it argued to the court of appeals that false claims could not affect the classification decision.

REASONS FOR GRANTING THE PETITION

A. The Court Should Grant the Petition to Resolve the Conflicting Positions of the Lower Courts Regarding the Statute of Limitations Applied to FCA Actions When the Government Does Not Intervene.

The court of appeals erroneously affirmed the district court's decision that NABI's false claims are only actionable for six years prior to Sanders' complaint when the government does not intervene. Courts in the D.C., Second, Fifth, Seventh, and Eleventh Circuits apply a uniform ten-year statute of limitations in non-intervened cases where there is no evidence of government knowledge of the fraud.

The statute of limitations provision of the FCA, 31 U.S.C. § 3731(b), contains two limitations periods which must be read together to determine the appropriate period to be applied to any action. The limitation period is either a minimum six-year period or a longer ten-year period, provided that the government has not been aware of the fraud for more than three years, "whichever occurs last." It is the government's knowledge of the false claims that stops the clock on an action filed by either the government or relator at the greater of six years or three years from the date of knowledge by an official of the United States. A whistleblower has up to ten years (depending on the knowledge of a responsible governmental official) but has an incentive to file as early as possible or risk losing jurisdiction (by prior public disclosure or pre-emptive filing by the government or another

whistleblower). Since these provisions must be read together, and since there is no indication that the government was aware of NABI's false claims, Mr. Sanders should be entitled to the longer ten-year period.

The lower courts are in a state of chaos as to which of three different interpretations of the 31 U.S.C. § 3731(b) applies to relator-filed FCA actions. The current statute states:

> (b) A civil action under section 3730 may not be brought –
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

31 U.S.C. § 3731(b).

The decision in this case is typical of a number of decisions that base the limitation period on questionable policy considerations rather than the literal text of the statute and a re-writing of the provision to

implement those considerations.[2] The court begins by asserting that it would be "problematic" to read the statute any other way except limiting relator actions to six years. App. 11. Focusing on the language of § 3731(b)(2), the court notes that it refers only to the government and states that it would "produce the bizarre scenario in which the limitations period in a relator's action depends on the knowledge of a non-party to the action." App. 11-12. The court therefore rewrote § 3731(b)(2) by adding "in actions filed by the government." While the court may describe this as a "bizarre" result, it would also be a very rare result. The reason why relator-filed FCA cases are called "whistleblower" actions, is that the government is unaware of the fraud until a relator blows the whistle. The court's hypothetical concern is not such a common event that it requires limiting the words of the statute. Of note, none of the cases discussing the statute of limitations describe a set of facts in which a responsible government official with knowledge of the fraud would have limited the relator's action to six

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[2] *See United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah,* 472 F.3d 702 (10th Cir. 2006); *United States ex rel. Fisher v. Network Software Assocs., Inc.*, 180 F. Supp. 2d 192, 194 (D.D.C. 2002); *United States ex rel. El Amin v. George Washington Univ.*, 26 F. Supp. 2d 162, 172-73 (D.D.C. 1998); *United States ex rel. Finney v. Nextwave Telecom, Inc.*, 337 B.R. 479, 486 (S.D.N.Y. 2006); *United States ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd.*, 6 F. Supp. 2d 263, 265 (S.D.N.Y. 1998); *United States ex rel. Vosika v. Starkey Labs., Inc.*, No. Civ. 01-709, 2004 WL 2065127, at *2-*3 (D. Minn. Sept. 8, 2004).

years. If this possible result were indeed "problematical," one would expect it to have arisen in the almost 25 years since the current statute has been in effect. The court may not rewrite the FCA to implement its own policy considerations, at least without a finding not made here that the plain reading is absurd. It seems entirely rational for Congress to extend the limitation period for *both* relator- and government-filed actions when the government lacks knowledge to act. After all, the essence of wrongdoing actionable under the FCA is concealment.

The court continued with other policy reasons for ignoring the words of the statute. Included was the supposed concern that a relator would wait ten years until his monetary claims built up thereby increasing his potential recovery at the expense of taxpayers. Again, these concerns are unrealistic, and again the court can point to no case where this has occurred. The FCA contains potent incentives for the relator to file as quickly as possible. No relator would delay to let his claims build up, risking another party or the government filing a case before him or that a public disclosure of the fraud might bar a subsequent relator action. Either event would cut off all of his rights in his claim, and he would be left with nothing. 31 U.S.C. §§ 3730(b)(5), 3730(e)(4)(A). Because of this danger, once a relator with strong evidence of fraud connects with an experienced FCA attorney, there is a rush to the courthouse. *See United States ex rel. Pogue v. Diabetes Treatment Centers of America*, 474 F. Supp. 2d 75 (D.D.C. 2007) ("This hypothetical

scenario is too implausible to provide a justification for tweaking the straightforward words of a statute.").

The leading case for the second interpretation is *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211 (9th Cir. 1996) in which the Ninth Circuit held that the tolling provision of section 3731(b)(2) does apply to relators, but that the timing of the relator's knowledge controls its application to his *qui tam* action.[3] In *Hyatt*, the court based its decision on the rationale that the reference to an "official of the United States" in (b)(2) must by implication include relators, because in other parts of the statute and the legislative history, that conclusion is unmistakable. *Hyatt,* 91 F.3d at 1214-15. Under this interpretation, the relator would be covered by (b)(2), but would be subject to the three-year tolling provision. This interpretation is not supported by the text (which expressly starts the clock on the "date when facts material to the right of action are known or reasonably should have been known by the *official of the United States* charged with responsibility to act in the

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[3] *See also United States ex rel. Lowman v. Hilton Head Health Care Sys., L.P.*, 487 F. Supp. 2d 682 (D.S.C. 2007); *United States ex rel. Saaf v. Lehman Bros.*, 123 F.3d 1307 (9th Cir. 1997); *United States ex rel. Downy v. Corning, Inc.*, 118 F. Supp. 2d 1160 (D.N.M. 2000); *United States ex rel. Bidani v. Lewis*, 1999 WL 163053 (N.D. Ill. 1999) and *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 2002 WL 31455718 (W.D. N.C. 2002) (*rev'd and vacated on other grounds* 367 F.3d 245 (4th Cir. 2004)).

circumstances"), or the legislative history. While the words "government" and "United States" may have been used loosely in other parts of the statute or legislative history, here they use the very specific "official within the Department of Justice with the authority to act in the circumstances" (legislative history)[4] and "official of the United States with responsibility to act" (statute) when describing the relevant person for statute of limitations purposes. *See Pogue*, 474 F. Supp. 2d at 87.

The *Pogue* decision represents the third line of cases interpreting § 3731(b) and is the most faithful to the words of the statute and contains the most careful analysis of the statute and its legislative history. The same position was adopted by the courts in *United States ex rel. Lewis v. Walker*, 2007 WL 2713018 (M.D. Ga. 2007) at *5-*6; *United States ex rel. Gonzales v. Fresenius Medical Care North America*, 2008 WL 4277150 (W.D. Tx. 2008) at *7-*8; *United States ex rel. Salmeron v. Enterprise Recovery Sys.*, 464 F. Supp. 2d 766 (N.D. Ill. 2006); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 777 F.Supp. 195 (N.D.N.Y. 1991); and *United States ex rel. Colunga v. Hercules, Inc.*, 1998 WL 310481 (D. Ut. 1998), *overruled by Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702 (10th Cir. 2006). These courts held that the ten-year limitations period of § 3731(b)(2) does apply to relators, but that

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[4] S.Rep. No. 345, 99th Cong., 2d Sess., 30 (July 28, 1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5295.

its tolling provision does not implicate relator knowledge. Instead, the relevant knowledge for purposes of calculating time is the date when an official of the United States learned of the fraud. Under this interpretation, the statute of limitations would be the same for the government as the relator, and if an official of the United States never learned of the fraud, the relator would have ten years to bring his action.

As noted in *Pogue*, the Court should begin any analysis with the language of the statute itself. As *Pogue* explains, the prefatory language of § 3731(b), "a civil action under section 3730" includes both the government *and* relators. *Pogue*, 474 F. Supp. 2d at 84. In order to have different limitation periods for actions brought by relators and government, differentiating language must be found in the subordinate clauses. *Id.* An examination of subsection (b)(2) does not reveal "any negative words or words of exclusion." *Id.* The *Pogue* court concluded that "the language of § 3731(b) includes relators, and the language of (b)(2) does not exclude them." *Id.* It criticized other courts that attempted to find implicit exclusion by reference to the words "official of the United States," pointing out that if that were the intent of Congress, it could have done so explicitly. *Id.* Finally, the last clause of the section, "whichever occurs last," applies to both subordinate clauses and obviously means that they should be read together. *Id.* at 85. The court of appeals decision and those like it essentially ignore the last clause of the statute, forgetting "that it is the

later of the two alternatives that establishes the time bar." *Salmeron*, 464 F. Supp.2d at 469 (emphasis in the original).

The fact that the court of appeals and other courts have erroneously applied the statute and misconstrued the legislative intent of the 1986 amendments to the FCA has prompted legislative attempts by the last and current Congresses to correct this and other erroneous court interpretations.[5]

Congress is again considering legislation that would eliminate any confusion caused by the current statute by creating a uniform ten-year limitations period.[6] This bill was introduced by Senator Grassley, the sponsor of the 1986 amendments to the FCA which contained the current limitations period. With these new amendments, Senator Grassley seeks to overturn a number of judicial decisions that have

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[5] *See* S. 2041, False Claims Act Corrections Act of 2007, 153 Cong. Rec. S11506-509 (Sept. 12, 2007) (introduced by Senators Grassley, Durbin, Leahy, Specter and Whitehouse) (Senator Grassley states in his introductory remarks: "Recent decisions by Federal courts have limited the False Claims Act in a way that was not envisioned when I authored the 1986 amendments. These court decisions threaten to undermine both the spirit and intent of the 1986 amendments.").

[6] The proposed Senate amendment of § 3731(b) states simply:

> (b)(1) A civil action under section 3730 may not be brought more than 10 years after the date on which the violation of section 3729 or 3730 is committed. (S 458 § 6 reintroduced Feb. 24, 2009.)

interpreted the FCA in ways not intended by the drafters of the 1986 amendments.[7] Since the Court has not decided this issue, it should accept Senator Grassley's guidance and reach a result that is consistent with the current legislative proposals.

B. The Court Should Grant the Petition to Resolve the Conflicting Positions of the Lower Courts Regarding the Appropriate Standard for Materiality, if any, to be Applied in FCA Actions.

The FCA does not include a specific requirement for alleging or proving the materiality of a false claim. The lower courts, however, have engrafted two different standards for materiality onto the FCA. The first is typified by the decision in *United States ex rel. Berge v. Trustees of Univ. of Alabama*, 104 F.3d 1453 (4th Cir. 1997), adopting the "natural tendency," test expressed as "whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action." *Id.* at 1459. At least four other circuits have adopted the "natural tendency" test. *See United States v. Bourseau*, 531 F.3d 1159, 1171 (9th Cir. 2008), *cert. denied*, ___ U.S. ___ (2009); *United States v. Rogan*, 517 F.3d 449, 452 (7th Cir. 2008); *United States ex rel. Bahrani v. Conagra, Inc.*, 465 F.3d 1189, 1204 (10th Cir. 2006), *cert. denied*, 128 S. Ct. 388 (2007); *United States ex rel. A+*

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[7] 153 Cong. Rec. S11506.

Homecare, Inc. v. Medshares Mgmt. Group, Inc., 400 F.3d 428, 445-46 (6th Cir. 2004), *cert. denied*, 546 U.S. 1063 (2005).

As noted by the court in *A+ Homecare*, "[t]he Eighth Circuit has adopted a more stringent 'outcome materiality' test, which requires a showing that the alleged fraudulent actions had 'the purpose and effect of causing the United States to pay out money it is not obligated to pay, or those actions which intentionally deprive the United States of money it is lawfully due.'" *A+ Homecare*, 400 F.3d at 445 (citing *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 677 (8th Cir. 1998)). Under the "outcome materiality" test, the Eighth Circuit held that the plaintiff was required to show that the government agency would have acted differently had it known of the omission and concluded that, "'there is no false claim because [the agency's action] would have occurred regardless of [the defendant's] actions.'" *Id.* (*citing Rabushka ex rel. United States v. Crane Co.*, 122 F.3d 559, 563 (8th Cir. 1997), *cert. denied*, 523 U.S. 1040 (1998)).

In seeking to resolve the conflict between the lower courts, this Court should first address the question of whether the FCA includes a materiality element at all. Based on this Court's decisions in *United States v. Wells*, 519 U.S. 482 (1987) and *Neder v. United States*, 527 U.S. 1 (1999), a materiality requirement should not be read into the FCA. The *Wells-Neder* framework presents a three-step analysis for determining whether materiality is required by a statute. First, if the statute does not specifically include a materiality element, without more, it is not

required. *Wells*, 519 U.S. at 489-90; *Neder*, 527 U.S. at 20 (*citing Wells*). A materiality element may be implied, however, if the statute uses terms that have well-settled common law meanings that include materiality. *Wells*, 519 U.S. at 491; *Neder*, 527 U.S. at 22-23. Finally, this presumption may be rebutted if the text or the structure of the statute shows that the addition of a materiality requirement would create an inconsistency with the rest of the statute. *Neder*, 527 U.S. at 22-25.

The application of this framework to the seven different provisions of the FCA imposing liability for false claims, demonstrates that most of those provisions should not require an implied materiality element.

Starting with the first prong of the *Wells-Neder* analysis, the FCA does not specifically require materiality. Therefore, the seven provisions of the FCA have to be analyzed separately to find a materiality requirement.

Sections 3729(a)(1) and (a)(2) are the two most often cited provisions of the FCA and use the terms "false or fraudulent claims." App. 51. The *Wells* Court determined that the term "false statement" did not create a presumption that materiality was an element of a statute.[8] Analyzing the term "fraud," the Court in *Neder* determined that it did require a

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[8] *Wells*, 519 U.S. at 491.

showing of materiality.[9] Therefore the use of the word "fraudulent" could imply that Congress intended that materiality be an element of subsections (a)(1) and (a)(2). The term is used, however, in the disjunctive with the term "false," which suggests that more analysis is required. Since both words are used, a party would only have to prove that a claim is false and not fraudulent. While all fraudulent claims are probably false, not all false claims are necessarily fraudulent. Therefore, a plaintiff could avoid the requirement to prove materiality in an FCA action by just alleging that the defendant made false claims rather than fraudulent claims.

Even if the focus is on the term "fraudulent" the remaining language of the statute demonstrates that materiality should not be required. Both (a)(1) and (a)(2) require a showing that a false claim is made "knowingly." This term is defined as follows:

> Knowing and knowingly defined. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information –
>
> (1) has actual knowledge of the information;
>
> (2) acts in deliberate ignorance of the truth or falsity of the information; or

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[9] *Neder*, 527 U.S. at 21-25.

> (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

31 U.S.C. § 3729(b).

In establishing this relaxed standard for knowledge, Congress in 1986 overturned several decisions which had required heightened proof of scienter. *See* James B. Helmer, Jr., False Claims Act: Whistler Blower Litigation, § 2-4(d) (5th ed. 2007). Specifically, by eliminating the requirement for specific intent, Congress was demonstrating that it was creating a statutory basis for remedying false claims against the government.[10]

Sections 3729(a)(3)-(a)(5) use the term "defraud" to describe the type of wrongdoing those provisions were attempting to remedy. Moreover, these three provisions do not use the term "knowingly." Therefore, a stronger case can be made for the requirement of materiality when these provisions are invoked.

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[10] In this regard, Sanders notes also that included in the proposals to amend the FCA is a provision that would eliminate any materiality requirement. That provision states:

> Statutory Cause of Action. -- Liability under this section is a statutory cause of action all elements of which are set forth in this section. No proof of any additional element of common law fraud or other cause of action is implied or required for liability to exist for a violation of subsection (a).

Section 3729 (c), HR 1788, The False Claims Act Corrections Act of 2009. (Introduced March 30, 2009).

However, these provisions are invoked rarely and they were not part of Petitioner Sanders' complaint.

Neither sections 3729(a)(6) and (a)(7) use the terms "fraud," "fraudulent," or "defraud." Therefore, under the *Wells-Neder* analysis, there is no requirement for a demonstration of materiality. Two of Sanders' Customs counts were pled under section 3729(a)(7) since they involved false claims to avoid paying money to the government.

The different "materiality" tests used by lower courts require this Court's guidance on the proper materiality test to be applied in FCA actions, if any. Absent clear guidance from the current Congress, the Court should take this opportunity to address this question.

C. The Court Should Exercise Its Supervisory Powers to Correct the Lower Courts' Improper Application of the Materiality Element Based on the "Natural Tendency" Test.

If the Court determines that the FCA includes a materiality element and that element should be governed by the "natural tendency" test, the Court should exercise its supervisory powers to ensure that the test is applied correctly. While both the district court and the court of appeals purported to apply the "natural tendency" test, both effectively adopted the "outcome materiality" test. Both courts determined

what Customs *would have* done had it known the true facts instead of what Customs *could have* done.

The district court concluded:

> I would find that the Customs decision could not have been affected by the alleged false statements relating to permanent installation because the decision would have been the same whether or not the components had been permanently installed. I note, however, that in my judgment a more precise formulation of the proper inquiry is whether, even in the absence of permanently installed components, Customs still would have classified the NABI imports as unfinished buses rather than bus shells.

App. 39.

The court's assumption about what Customs would have done had NABI honestly described its bus body imports is expressly contradicted by the Customs ruling itself which explicitly stated that its decision to reclassify the imports as finished busses was based on representations that the shell contained a "*substantial amount of equipment and number of components necessary for a completed transit bus.*" App. 23. The court had no way of knowing that Customs would have made the same decision in the absence of the false claims. Given the facts presented and the stated position of Customs, the most that the court could determine is that Customs "could have" classified the bus shells in either provision. The court's absolutist position is also called into question

by its refusal to consider the government's belated attempt to reconsider its intervention decision. App. 35-36 n.1. Certainly, given the government's demonstration of uncertainty, the court should have drawn the opposite conclusion and acknowledged that Customs was at least considering classifying the shells as bus bodies. If Customs was considering that decision, then as a legal matter, it *could* have imposed that classification, and NABI's false statements would have been material.

Similarly, the court of appeals minimizes the components that Sanders alleges to be missing and then concludes:

> Assuming for purposes of argument that NABI's statements were false, Sanders has given us no reason to believe that when Customs considered a protest that listed twenty imported components those false statements regarding one or two missing components – much less subcomponents – were material to Customs' decision.

App. 22. Again, this conclusion flies in the face of the standard that Customs used to determine the proper classification: the "*substantial amount of equipment and number of components necessary for a completed transit bus.*" This conclusion also ignores the fact that the components about which NABI lied were four of the most important operating systems containing many components and subcomponents. Given that this was a protest of the classification of previous importations, it was at the very least a close question.

Obviously NABI thought so, giving it a strong motive to falsely describe its bus shell imports. How could the court possibly know whether the false claims could not have affected the classification decision?

Further, the decision deliberately ignored the government's affidavit used to secure a search warrant of NABI's facility. The search warrant reflects Customs' belated investigation of Sanders' allegations and concludes that he was correct App. 76. Even though it had the power to do so under Fed. R. Evid. 201(f),[11] the Panel refused to consider this information, because it was "outside" the record in this case. App. 27. The Panel chose to ignore information that contradicted its findings and issued an opinion that was demonstrably at odds with that of the agency based solely on the fact that Customs' search warrant was released after the district court's decision. Ultimately, had the court of appeals accepted the government's affidavit, it would have mooted the entire question of materiality, because the affidavit demonstrates that the false claims were material under

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[11] *See e.g. Philip Medical Sys. International, B.V. v. Bruetman*, 982 F.2d 211 (7th Cir. 1992); *Dobbs v. Anthem Blue Cross & Blue Shield*, 475 F.3d 1176, 1179 (10th Cir. 2007) ("Although notice is not required under Rule 28(j), good advocates nevertheless file such notice out of respect for this Court and a commitment to resolving disputes in an expeditious manner. Particularly when a legal development is controlling, as it is here, we admonish counsel to bring the relevant authority to the Court's attention.").

either the "natural tendency" or "outcome materiality" tests.

Beyond the fact that the district court and the court of appeals got the decision wrong, an important consideration for this Petition is the methodology the courts employed in reaching that decision. The Customs ruling does not say what components were important to its classification decision. The protest listed 20 components that were on the imported shell.[12] Sanders alleges, and the record shows, that at least four of those components were not complete or not imported with the shells. The incomplete or missing components were the front suspension, rear suspension, power steering, and brake chamber. Effectively, the Panel held that since NABI lied about only 4 of the 20 components, the lies were not material. This defies the concept of materiality based on the "natural tendency" test. What would be material – 5 of 20, 8 of 20, 10 of 20? There is no way to determine from the Panel's decision how many lies would be material. If this decision is followed by other courts, it effectively tells those courts that they can ignore legal requirements and issue judgments based on the subjective feeling of the court. Far beyond Customs

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[12] Those components were: the base structure; body; axles; front suspension; rear suspension; rims; wheels; power steering; brake chamber; fuel tank; engine cradle; flooring; partial door system including the door panels; windshield; outside body trim; corrosion protection paint; steering wheel; tracking for interior lights; air duct system; and destination sign door and enclosure. App. 22, n.4.

cases, it gives no guidance to future courts in applying the natural tendency test, substituting a slippery slope and judicial arbitrariness for the easily understood and applied "could have" test. It effectively states that lies are not necessarily material even when they go to the core of the government's decision making process.

According to the Panel, apparently, the natural tendency test must involve some sliding scale of weighing the lies in order to determine materiality. Customs tells us in their ruling that they focused on the components to determine the classification. A showing that NABI lied about one or two, or as in this case, a minimum of four of those components, is sufficient evidence to demonstrate that Customs potentially could have classified the shells as bus bodies. The Panel improperly substituted its assumptions about what Customs would have done instead of showing deference and respect to what Customs could have done, and in fact did after the district court's decision.

The lower courts effectively applied the "outcome materiality" test by assuming that there was only one legal conclusion that could have been made. This is the wrong application of the "natural tendency" test. This Court should grant the Petition if only to give guidance to the lower courts on the proper application of the "natural tendency" test.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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546 F.3d 288

United States Court of Appeals,
Fourth Circuit.
UNITED STATES of America ex rel.
Thornton G. **SANDERS**, Plaintiff-Appellant,
v.
NORTH AMERICAN BUS INDUSTRIES, INCORPORATED; Deloitte & Touche USA, LLP; North American Bus Industries Kft., Defendants-Appellees,
and
North American Bus Industries, Rt.; American Ikarus; Peter Z. Rona; The First Hungary Fund, Defendants.
Taxpayers Against Fraud Education Fund, Amicus Supporting Appellant.
No. 07-1773.

Argued: Sept. 24, 2008.
Decided: Nov. 5, 2008.

ARGUED: Joseph A. Black, Cullen Law Firm, P.L.L.C., Washington, D.C., for Appellant. James Patrick Ulwick, Kramon & Graham, Baltimore, Maryland; Amelia Toy Rudolph, Sutherland, Asbill & Brennan, Atlanta, Georgia, for Appellees. **ON BRIEF:** Daniel E. Cohen, Cullen Law Firm, P.L.L.C., Washington, D.C., for Appellant. Melissa H. Maxman, Baker & Hostetler, L.L.P., Washington, D.C., for Appellees North American Bus Industries, Incorporated and North American Bus Industries, Kft. Mike Bothwell, Sara Vann, Bothwell & Harris, P.C., Roswell, Georgia; James W. Moorman, Joseph E.B.

White, Taxpayers Against Fraud Education Fund, Washington, D.C., for Amicus Supporting Appellant.

Before WILKINSON, Circuit Judge, HAMILTON, Senior Circuit Judge, and JAMES C. CACHERIS, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge WILKINSON wrote the opinion, in which Senior Judge HAMILTON and Senior Judge CACHERIS joined.

OPINION

WILKINSON, Circuit Judge:

This appeal arises from a *qui tam* action under the False Claims Act brought by Thornton G. Sanders against his former employer, North American Bus Industries, Inc. ("NABI"). Sanders alleges that NABI defrauded the United States by underpaying duties on bus frames that NABI imported from Hungary and by falsely certifying that the buses that NABI manufactured using those frames were eligible for federal "Buy America" subsidies. Sanders also alleges that Deloitte & Touche USA, LLP, participated in NABI's fraud.

The district court rejected all of Sanders's claims on various grounds. Sanders now challenges each of those dismissals, asserting myriad defects of both fact and law. We agree, however, with the district court that plaintiff has failed to establish the necessary

elements of an FCA claim. We thus affirm the judgment.

I.

A.

NABI is an Alabama corporation that manufactures and sells transit buses. The manufacturing process occurs in stages. First, the bus frames, or "shells," are constructed by NABI's corporate parent, North American Bus Industries, Kft. ("NABI Hungary"). NABI Hungary then ships the shells to NABI's headquarters in Alabama. The shipments include a number of components, like the wheels, some of which are fixed permanently to the shells prior to shipment. NABI then completes the assembly, using both the shipped components and additional American-made parts.

NABI distributes the completed buses to municipalities and transit authorities throughout the United States. The federal government subsidizes these local entities for purchases of buses that meet federal "Buy America" requirements. *See* 49 U.S.C. § 5323(j); 49 C.F.R. §§ 661.1-.21. Local entities receiving subsidies require NABI to certify that its buses satisfy the Buy America provisions. In particular, NABI must certify that more than sixty percent of the components in its completed buses (by cost) are produced in the United States.

The bus shells and components that NABI imports from its Hungarian parent are taxed according to the Harmonized Tariff Schedule of the United States ("HTSUS"), which provides the various classifications and corresponding rates of duty for imported merchandise. *See* 19 U.S.C. § 1202. Prior to June 1998, NABI's bus shells were classified under the HTSUS subheading for "Bodies (including cabs), for . . . motor vehicles." HTSUS subheading 8707.90.50. That classification carried a duty of four percent of the value of the imported bus shells and components.

In June 1998, NABI hired Damon Pike, a director at Deloitte, to file a protest on NABI's behalf with the U.S. Customs Service (currently U.S. Customs and Border Protection). *See* 19 U.S.C. § 1514 (Customs protests); 19 C.F.R. pt. 174. NABI sought to have its previous imports reclassified under the HTSUS subheading for "Motor vehicles [with a diesel engine] . . . [d]esigned for the transport of 16 or more persons, including the driver." HTSUS subheading 8702.10.30. In other words, NABI sought to have the imports that previously had been classified as mere bodies of buses reclassified under the subheading for completed motor vehicles. Under the latter classification, NABI's imports would have been eligible for duty-free treatment under the Generalized System of Preferences because the imports were from Hungary. *See* 19 U.S.C. §§ 2461-2467.

NABI's protest relied primarily on General Rule of Interpretation 2(a) of the HTSUS. Rule 2(a) provides that "[a]ny reference in a heading to an article

shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article."

Based on that rule, NABI argued that its bus shells should be reclassified because they had the "essential character" of finished motor vehicles. NABI supported that argument by listing twenty components that it asserted were "permanently installed" on the bus shells at the time of importation. NABI's protest did concede that, when compared with the imports in a prior Customs ruling on trolley bus shells, NABI's imported components were somewhat fewer and had a somewhat lesser value. NABI's protest further expressly listed twelve components that NABI acknowledged were installed only after importation. But NABI argued that those differences and missing parts did not alter the "essential character" of NABI's imports.

In November 1998, Customs issued a decision granting NABI's protest and holding that NABI's imports should have been classified under subheading 8702.10.30 as "motor vehicles" eligible for duty-free treatment. The decision cited the components listed in NABI's protest and noted that the remaining components were installed after importation. Customs then stated its finding that "[t]he bus shells when imported contain a substantial amount of equipment and number of components necessary for a completed transit bus." Customs concluded that

NABI's imports, even in their "unfinished state," had the "essential character" of motor vehicles.

Based on the successful protest decision, NABI received refunds of duties that it had paid on bus shells imported between April and August 1997; statutory deadlines prevented NABI from seeking refunds for earlier imports. Apparently based in part on the advice of Damon Pike of Deloitte, NABI also began classifying its subsequent imports under the duty-free subheading for motor vehicles.

B.

Thornton G. Sanders, the *qui tam* relator in this action, is a former executive of NABI. NABI hired Sanders as Vice President and Chief Financial Officer in 1993. In 1994, Sanders became President and Director of NABI.[1]

During his employment at NABI, Sanders raised questions within the company about certain contracts between NABI and NABI Hungary. NABI and its parent company entered into two separate contracts for each set of bus shells that NABI imported in the years from 1993 to 1997. Under the first contract, NABI paid NABI Hungary for the bus shells and their components. Under the second contract, NABI

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[1] At that time, NABI was known as American Ikarus, Inc. Any distinctions between NABI and its predecessor corporation are immaterial to this case.

paid NABI Hungary for engineering and technology services. NABI characterized those services as consisting of both tangible designs and intangible technical information that assisted NABI in assembling the imported shells and parts. Because NABI did not consider the engineering and technology services to be part of the value of the imported bus shells, NABI did not include the cost of those services when declaring the value of the shells to Customs, or when calculating the eligibility of its buses for Buy America subsidies.

In 1996, Sanders sent memoranda to others at NABI recommending that NABI discontinue its separate payments for engineering and technology services. Sanders asserted that the company's payments did not accurately reflect the technical assistance that NABI was receiving from NABI Hungary. Apparently acting on Sanders's recommendation, NABI discontinued its separate contracts for engineering and technology services in 1997.

NABI also terminated Sanders's employment in 1997, shortly after Sanders proposed that the company be sold to a group of investors that included himself and NABI's other senior managers. Sanders subsequently wrote a letter to another NABI employee stating that he had been fired because executives at NABI Hungary viewed Sanders's proposed purchase of the company as an act of disloyalty.

C.

Sanders subsequently filed suit against NABI in 2002 under the *qui tam* provisions of the False Claims Act ("FCA"). 31 U.S.C. §§ 3729-3733. Section 3729 of the FCA creates liability in the form of treble damages and civil penalties of up to $10,000 for persons who make false or fraudulent claims for payment to the United States. *Id.* § 3729(a). And Section 3730 provides that civil actions under the FCA may be brought either by the Attorney General, *id.* § 3730(a), or by private persons, known as relators, who sue on the federal government's behalf, *id.* § 3730(b). A relator may recover up to thirty percent of the proceeds of a successful action, plus attorney's fees and costs. *Id.* § 3730(d). The relator must file his complaint under seal and notify the government of his action, and the government may then elect either to intervene in the suit or to allow the relator to continue the suit alone. *Id.* § 3730(b). The United States has consistently declined to intervene in Sanders's action.

Sanders stated five causes of action under the FCA. In Count I, Sanders claimed that NABI had falsely certified that its buses were eligible for Buy America subsidies. The district court granted summary judgment to NABI on Count I because Sanders's claims were barred by the FCA's six-year statute of limitations in 31 U.S.C. § 3731(b)(1) and because the United States had not suffered actual damages.

In Counts II and III, Sanders claimed that the protest submitted to Customs by NABI and Deloitte in 1998 contained a false description of NABI's imported bus shells. The district court granted Deloitte's motion to dismiss both counts as time-barred. The district court also granted summary judgment to NABI on Counts II and III. The court held that any alleged false statements in NABI's protest were immaterial to Customs' decision to reclassify NABI's imports.

In Count IV, Sanders claimed that NABI had also underpaid its duties by failing to declare to Customs the value of the separate payments that NABI made for engineering and technology services. The district court granted summary judgment to NABI, holding that the successful Customs decision made clear that NABI never owed any duties on its imports. Thus, even if NABI had failed to declare the imports' full value, the court held that NABI had not violated the FCA because NABI had not deprived the government of any money that it was actually due.

Finally, Sanders claimed in Count V that he had been wrongfully discharged in violation of the FCA's anti-retaliation provision. 31 U.S.C. § 3730(h). The district court dismissed Sanders's claim as time-barred under the Supreme Court's decision in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409, 125 S.Ct. 2444, 162 L.Ed.2d 390 (2005). Sanders did not oppose that dismissal.

Sanders now appeals the district court's disposition of each of his claims. We discuss those claims in turn.

II.

Sanders first contends that the district court misconstrued the FCA's statute of limitations, 31 U.S.C. § 3731(b), which provides the following:

> A civil action under section 3730 may not be brought –
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

The district court held that the six-year limitations period in Section 3731(b)(1) barred Sanders's claims against NABI in Count I and against Deloitte in Counts II and III. Sanders argues that the district court should have applied Section 3731(b)(2) to extend the limitations period for those claims. Sanders interprets Section 3731(b)(2) to allow a relator to bring a cause of action within ten years of an FCA

violation, as long as the relevant government official has not had actual or constructive knowledge of the violation for more than three years. We hold that Section 3731(b)(2) extends the FCA's statute of limitations beyond six years only in cases in which the United States is a party.

It would be problematic to read the text of the statute any other way. Section 3731(b)(2) refers only to the United States – and not to relators. Thus, Congress intended Section 3731(b)(2) to extend the FCA's default six-year period only in cases in which the government is a party, rather than to produce the bizarre scenario in which the limitations period in a relator's action depends on the knowledge of a non-party to the action.

The specific language in the statute bears this out. The limitations period in Section 3731(b)(2) starts when the government knows or should know of "facts material to the right of action." This language makes perfect sense when referring to an action brought by the government: the limitations period is based on the government's knowledge of "facts material to the right of action" because that particular knowledge notifies the government that it has an actionable FCA claim. But applying the statute's language to a relator's action makes no sense whatsoever. The government's knowledge of "facts material to the right of action" does not notify the relator of anything, so that knowledge cannot reasonably begin the limitations period for a relator's claims. Furthermore, once the material facts supporting a right of

action are known to the United States, it is doubtful that the government official "charged with responsibility to act in the circumstances" could be charged with any responsibility other than to see that the government brings or joins an FCA action within the limitations period. After all, government officials are certainly not "charged with responsibility" to ensure that a relator brings a timely FCA action. All of these textual elements demonstrate that Section 3731(b)(2) makes sense only when read to extend the FCA's limitations period in actions brought or joined by the United States.

Our reading of the statute's text finds support in the fact that Section 3731(b)(2) is almost identical to another federal statute, 28 U.S.C. § 2416(c). Section 2416(c) tolls the generally applicable statute of limitations in actions brought by the United States – and only by the United States – until "facts material to the right of action" are actually or constructively known by an "official of the United States charged with the responsibility to act in the circumstances." Section 2416 was enacted in 1966. *See* Pub.L. No. 89-505, § 1, 80 Stat. 304, 305 (1966). Congress added Section 3731(b)(2) to the FCA in 1986 (the FCA previously had a uniform six-year limitations period). *See* Pub.L. No. 99-562, § 5, 100 Stat. 3153, 3158 (1986). Thus, it appears that when enacting Section 3731(b)(2), Congress adopted the language from Section 2416(c) that applies only to actions brought by the government. This apparent transcription of statutory language supports the conclusion that the

text of Section 3731(b)(2) lengthens the FCA's limitations period only when the government is a party. *See United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah,* 472 F.3d 702, 724-25 (10th Cir.2006).

Sanders proffers a contrary reading of the statute's text. Sanders argues that Section 3731(b)(2)'s failure to mention relators actually supports the application of that section to *qui tam* actions. He contends that the phrase "[a] civil action under section 3730" in the preface to Section 3731(b) includes all civil actions under the FCA; he then argues that Section 3731(b)(2) does not contain any language expressly excluding relator actions; and he therefore concludes that relator actions fall within the scope of Section 3731(b)(2).

Sanders's argument fails for two reasons. First, Section 3731(b)(2) does contain language excluding actions by relators because the statutory language makes no sense when applied to an action in which the government is not a party. Second, we also disagree with Sanders's other premise, that "[a] civil action" must be read indiscriminately to encompass all FCA claims in all contexts. In fact, the Supreme Court recently rejected almost exactly the same argument in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson,* 545 U.S. 409, 125 S.Ct. 2444, 162 L.Ed.2d 390 (2005). In *Wilson,* the Supreme Court held that Section 3731(b)'s reference to civil actions under Section 3730 did not include anti-retaliation claims, even though

FCA anti-retaliation claims are brought under Section 3730(h). 545 U.S. at 411, 125 S.Ct. 2444. The Court recognized that "Congress used the term 'action under section 3730' imprecisely in § 3731 and, in particular, that Congress sometimes used the term to refer only to a subset of § 3730 actions." *Id.* at 418, 125 S.Ct. 2444. And the Court reasoned that when "a civil action" was read in context, Section 3731(b)(1)'s reference to a "violation of section 3729" suggested that the statute did not include anti-retaliation claims because a violation of Section 3729 was not an element of those claims. *See* 545 U.S. at 415-16, 125 S.Ct. 2444. The same reasoning applies here. When the phrase "a civil action" is read in context, Section 3731(b)(2)'s restrictive language referring to the United States – and not to relators – makes clear that only a subset of civil actions may benefit from the extended limitations period in Section 3731(b)(2) – those in which the government is a party.

Sanders's proposed construction of the statute also generates numerous practical difficulties. Under Sanders's reading, the statute of limitations in *qui tam* actions would depend on the knowledge of a nonparty government official. Not only is that result counterintuitive, but it would also cause innumerable headaches for both defendants and the government during discovery. To advance a statute of limitations defense, defendants would be forced to seek out and litigate the identity and knowledge of a government official not a party to the action. And government agencies would be subjected to disruption and

expense in responding to discovery requests in actions in which the government affirmatively chose to avoid those concerns by declining to intervene. We are reluctant to place these burdens on FCA defendants and the government absent a clear textual basis for doing so.

Sanders's reading of Section 3731(b)(2) also would allow relators to sit on their claims for up to ten years before filing an action and informing the government of the material facts. Indeed, relators would have a strong financial incentive to allow false claims to build up over time before they filed, thereby increasing their own potential recovery. By empowering relators to extend the limitations period at will, Sanders's reading would render the six-year limitations period in Section 3731(b)(1) superfluous in nearly all FCA cases, thereby contradicting "our duty to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) (internal quotations omitted); *see Sikkenga*, 472 F.3d at 725-26 (agreeing that the approach advocated by Sanders would render Section 3731(b)(1) superfluous).

Moreover, allowing relators to sit on their claims would undermine the purpose of the *qui tam* provisions of the FCA: to combat fraud quickly and efficiently by encouraging relators to bring actions that the government cannot or will not – "to stimulate actions by private parties should the prosecuting officers be tardy in bringing the suits." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 547, 63 S.Ct.

379, 87 L.Ed. 443 (1943); *Sikkenga,* 472 F.3d at 725. Sanders's interpretation would instead allow fraud to continue unabated for up to ten years. And a relator's failure to notify the government promptly of FCA violations might also cause the government to lose out on its ability to bring a criminal fraud prosecution, which must be filed within five years of the violation. *See* 18 U.S.C. §§ 287, 3282; *United States ex rel. Hyatt v. Northrop Corp.,* 91 F.3d 1211, 1218 (9th Cir.1996).

This issue has admittedly given rise to different approaches in the federal courts. Our interpretation of Section 3731(b) is decidedly the majority approach in the federal courts of appeals, where no circuit court has accepted Sanders's view that Section 3731(b)(2) extends the limitations period in *qui tam* actions regardless of how long the relator has known of the material facts. The Tenth Circuit has expressly held that Section 3731(b)(2) does not apply to *qui tam* suits in which the government has not intervened. *Sikkenga,* 472 F.3d at 725; *see also United States ex rel. Erskine v. Baker,* No. 99-50034, 2000 WL 554644, at *1 (5th Cir. Apr.13, 2000) (same); *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.,* 501 F.3d 493, 515, 519-20 (6th Cir.2007) (applying six-year limitations period to a relator's claims); *Foster v. Savannah Commc'n,* 140 Fed.Appx. 905, 907-08 (11th Cir.2005) (same). *But see Hyatt,* 91 F.3d 1211, 1214-18 (9th Cir.1996) (holding that Section 3731(b)(2) applies when the government is not a party but that the relator is the "official of the United States" on whose

knowledge the limitations period depends); *United States ex rel. Malloy v. Telephonics Corp.*, 68 Fed.Appx. 270, 272-73 (3d Cir.2003) (also interpreting Section 3731(b)(2) to depend on the relator's knowledge).[2]

The majority of district courts in circuits other than these are also in accord with our interpretation. *See United States ex rel. Fisher v. Network Software Assocs., Inc.*, 180 F.Supp.2d 192, 194 (D.D.C.2002); *United States ex rel. El Amin v. George Washington Univ.*, 26 F.Supp.2d 162, 172-73 (D.D.C.1998); *United States ex rel. Finney v. Nextwave Telecom, Inc.*, 337 B.R. 479, 486 (S.D.N.Y.2006); *United States ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd.*, 6 F.Supp.2d 263, 265 (S.D.N.Y.1998); *United States ex rel. Vosika v. Starkey Labs., Inc.*, No. Civ. 01-709, 2004 WL 2065127, at *2-3 (D.Minn. Sept.8, 2004). A minority, however, has adopted Sanders's view. *See United States ex rel. Pogue v. Diabetes Treatment Ctrs. of America*, 474 F.Supp.2d 75, 81-89 (D.D.C.2007); *United States ex rel. Salmeron v. Enterprise Recovery Sys., Inc.*, 464 F.Supp.2d 766, 769-70 (N.D.Ill.2006);

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[2] Because we hold that Sanders cannot seek the benefit of Section 3731(b)(2), we need not and do not decide which specific government official is "charged with responsibility to act in the circumstances" – a question that has perplexed some courts. *Compare United States v. Macomb Contracting Corp.*, 763 F.Supp. 272, 274 (M.D.Tenn.1990) (relevant official must be within the Department of Justice) *with United States v. Tech Refrigeration*, 143 F.Supp.2d 1006, 1009-10 (N.D.Ill.2001) (knowledge of other government officials may be imputed to DOJ).

United States ex rel. Kreindler & Kreindler v. United Techs. Corp., 777 F.Supp. 195, 204-05 (N.D.N.Y.1991).

Based on our interpretation of Section 3731(b), we affirm the district court's grant of summary judgment on Count I to NABI. Before the district court, Sanders limited the scope of Count I solely to claims that arose outside of the six-year limitations period. We therefore need not reach the question of whether the government suffered actual damages from the Buy America fraud that Sanders alleged in Count I. We also affirm the district court's dismissal of Counts II and III against Deloitte as time-barred.[3]

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[3] Sanders tries to circumvent the district court's holding that his claims against Deloitte under Count III were untimely. Even though all of Deloitte's alleged misconduct occurred outside of six years, Sanders contends that Deloitte caused subsequent violations by NABI within the limitations period. But that was not the theory of liability expressed in Count III of Sanders's complaint, which did not allege any independent FCA violations other than the supposedly false Customs protest. *See Second Amended Complaint* ¶ 40. Count III as pleaded against Deloitte was therefore time-barred. And even if we were to construe Count III to contemplate additional, independent FCA violations, Sanders's complaint warranted dismissal for other reasons. For one, Sanders failed to adequately plead the element of causation because Deloitte's alleged advice to NABI to enter its bus shells duty-free was superfluous to the Customs decision itself. Furthermore, Sanders failed to allege any FCA violations within the statutory period with the particularity required by Federal Rule of Civil Procedure 9(b).

III.

Sanders contends that the district court erred when it granted summary judgment to NABI on Counts II and III of Sanders's complaint. In those counts, Sanders claimed that NABI violated the FCA because the protest that NABI submitted to Customs in 1998 misrepresented the condition of the company's bus shells when they were imported, thereby improperly allowing NABI to obtain duty-free treatment for its imports. The district court held that Sanders failed to establish that the alleged false statements made by NABI in its protest were material to Customs' decision to reclassify NABI's imports.

The elements of an FCA claim are straightforward. "[T]he plaintiff must prove: (1) that the defendant made a false statement or engaged in a fraudulent course of conduct; (2) such statement or conduct was made or carried out with the requisite scienter; (3) the statement or conduct was material; and (4) the statement or conduct caused the government to pay out money or to forfeit money due." *Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 913 (4th Cir.2003). The standard for materiality in the Fourth Circuit is also settled. "Under the FCA, a statement or course of conduct is material if it 'has a natural tendency to influence agency action or is capable of influencing agency action.'" *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 378 (4th Cir.2008) (quoting *United States ex rel. Berge v. Bd. of Trs. of the Univ. of Ala.*, 104 F.3d 1453, 1460 (4th Cir.1997)).

Sanders did not allege under Counts II and III that NABI made any false statement outside of the protest that it submitted to Customs. *Second Amended Complaint* ¶¶ 37-41. We therefore analyze only the materiality of the protest's alleged misstatements. NABI argued that its bus shells should be reclassified because they had the "essential character" of finished motor vehicles. And to support that argument, the protest listed twenty components and stated that those components were "permanently installed" when the shells were imported.

Before the district court, Sanders claimed initially that the protest was materially false because some of the named components were not "*permanently* installed." *Second Amended Complaint* ¶ 24; *Opposition to Deloitte's Motion to Dismiss* at 18 ("The Amended Complaint also sets forth the factual basis for the falsity of the protest, i.e., that at least seven specific components were not permanently installed."). For example, Sanders contended that the protest was false because the axles imported with the bus shells had to be removed and subsequently reattached after importation. *Second Amended Complaint* ¶ 26.

Sanders's initial argument failed because the issue of permanent installation was clearly immaterial to Customs' classification of NABI's bus shells. Customs' decision in favor of NABI did not rely on a finding that any components were installed permanently. Instead, it relied solely on a finding that the bus shells "contain[ed] a substantial amount of

equipment and number of components necessary for a completed transit bus." A previous Customs ruling (cited by NABI in its protest) also looked only to the presence of components, not to whether they were permanently installed. Sanders therefore eventually acknowledged in his summary judgment motion that permanent installation was immaterial: "For classification purposes, it does not matter if any of the components were permanently installed." *Sanders's Motion for Summary Judgment* at 14.

After conceding on the issue of permanent installation, Sanders nonetheless argues that NABI's protest was materially false because a few of the components listed in the protest were either themselves partially incomplete or were not actually imported with the bus shells. But even when the evidence in the record is viewed generously in Sanders's favor, it is clear that the protest at most contained minor deficiencies. The evidence shows that no more than one or two subcomponents of the suspension and power steering systems were not imported with the bus shells. Most, but not all, of the buses' wheels and tires were included. And some of NABI's bus shells (apparently beginning with the ones imported in the spring of 1998) did not include brake chambers and were imported with axles that were removed and sent back to Hungary. Sanders does not allege that any other components listed in NABI's protest were missing or incomplete, nor does the evidence in the record suggest that to be the case.

When the record evidence is properly characterized, the flaw in Sanders's claim is obvious. Assuming for purposes of argument that NABI's statements were false, Sanders has given us no reason to believe that when Customs considered a protest that listed twenty imported components,[4] those false statements regarding one or two missing components – much less subcomponents – were material to Customs' decision.[5]

Sanders has focused most of his energy on alleging falsity in the protest by diving into the minute details of the subcomponents of the bus shells. But as Sanders's claims of falsity become narrower, the alleged falsehoods become less likely to be material. That is particularly so where the question for Customs was not whether every component and subcomponent in the protest was present, but whether the bus shells had the "essential character" of buses. When it answered that question in the affirmative, Customs did not rely on the presence of any specific component. Instead, its decision found in broad terms

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[4] Those components were: the base structure; body; axles; front suspension; rear suspension; rims; wheels; power steering; brake chamber; fuel tank; engine cradle; flooring; partial door system including the door panels; windshield; outside body trim; corrosion protection paint; steering wheel; tracking for interior lights; air duct system; and destination sign door and enclosure.

[5] The protest also acknowledged that twelve components were not installed: the propulsion system; traction system; cooling system; heating and air conditioning; electrical system; bumpers; seats and stanchions; side windows; interior lighting; exterior lamps; passenger signals; and non-standard customer options.

that the bus shells "contain[ed] a substantial amount of equipment and number of components necessary for a completed transit bus." Thus, we find no reason to believe that the particulars proffered by Sanders had any bearing on Customs' holistic analysis.

Sanders, however, takes vigorous exception to the actions of both Customs and the district court. First, Sanders attempts to find fault with the district court's precise expression of the materiality standard. He argues that the district court applied the incorrect test by analyzing whether the missing components or subcomponents in the protest "would have," rather than "could have," affected Customs' decision. But the district court expressly found a lack of materiality under the "could have" formulation pressed by Sanders. JA 1430. And regardless, the materiality inquiry does not turn on questions of "would have" versus "could have." The standard is whether NABI's alleged false statements had "a natural tendency to influence agency action or [were] capable of influencing agency action." *Berge,* 104 F.3d at 1460. Under that standard, the false statements alleged by Sanders were immaterial to Customs' decision.

Sanders also disagrees with the determination by Customs that NABI's bus shells were properly classified as motor vehicles. Sanders thinks that the shells were so incomplete that they should have been classified under the alternative subheading for "bodies," and he goes on at length about 39 components that he asserts were missing from the shells. But of those 39 supposedly missing components, Sanders points to

only 3 that were listed in NABI's protest as being present in the bus shells. *Brief of Appellant* at 10-12. NABI also explicitly told Customs that many more of those 39 components were not included with its shells. And Sanders conceded at oral argument that NABI had made no misrepresentation to Customs regarding most of these 39 components. Furthermore, the Customs decision reflected the agency's knowledge that NABI's bus shells were far from complete. The decision stated that the bus shells arrived in the United States in an "unfinished state" and that only then were "the remaining necessary parts . . . installed to complete the transit bus[es]." Yet Customs still decided that NABI's bus shells had the "essential character" of motor vehicles. When Sanders complains that too many components were missing from NABI's bus shells for the shells to be classified as motor vehicles, he is therefore complaining not about misconduct by NABI, but about the Customs decision itself. Sanders may think that Customs' decision was wrong, but that does not make NABI's statements materially false.

IV.

Sanders next contends that the district court erred when it granted summary judgment to NABI on Count IV of Sanders's complaint. Sanders claimed in Count IV that – prior to its successful protest – NABI underpaid its duties to Customs because the company failed to declare as part of the value of its bus shells

the payments that it made to NABI Hungary for engineering and technology services.

We agree with the district court that Sanders failed to satisfy the fourth element of a cause of action under the FCA: that NABI's allegedly false statement or conduct "caused the government to pay out money or to forfeit money due." *Harrison,* 352 F.3d at 913. Because Customs determined that NABI's bus shells qualified for duty-free treatment under the HTSUS subheading for motor vehicles, NABI owed no duties on its imports, regardless of their declared value. Thus, even if NABI declared less than the correct value, NABI did not avoid any obligation to pay money to the government, 31 U.S.C. § 3729(a)(7), and the government forfeited no money that it was due.

Sanders responds with a creative – yet erroneous – argument. Sanders points out that when NABI filed its protest with Customs in 1998, statutory deadlines prevented the company from obtaining refunds of duties that it had paid before April 1997. Had NABI declared a larger value for its imports prior to April 1997, therefore, Sanders observes that NABI could not have recovered any of the extra duties that it would have paid. From this, Sanders concludes that the government suffered a loss in the additional amount that it would have received – and kept – had NABI declared the full value of its imports prior to April 1997.

Sanders's argument fails because the availability of a refund is irrelevant to the issue of whether the government forfeited money that it was due in the first place. Even if NABI could not obtain a refund of past duties, the Customs decision demonstrated that NABI should have been paying no duties all along. Thus, NABI cannot be said to have cheated the government out of anything that it was due. In fact, the earlier misclassification of NABI's imports worked in the government's favor by erroneously subjecting those imports to taxation. And the only reason that the limitations period on refunds bears any significance is that it saved the government from making NABI whole on its overpayments. Sanders essentially argues that NABI should be liable for failing to provide the government an additional windfall. That argument cannot sustain the fourth element of an FCA claim, so we affirm the district court's grant of summary judgment on Count IV.[6]

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[6] Sanders also appeals the district court's dismissal of his anti-retaliation claim under Section 3730(h). Sanders concedes, and we agree, that the district court correctly dismissed that claim as time-barred under the Supreme Court's decision in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409, 125 S.Ct. 2444, 162 L.Ed.2d 390 (2005). Sanders contends that his claim should be reinstated if Congress enacts legislation to overrule the result in *Wilson*. No such legislation has been enacted, so we affirm on this claim also.

V.

While this appeal was pending, Sanders submitted what he styled as two pieces of supplemental authority regarding developments within the past year: claims that Customs reclassified certain bus shells that NABI imported in December 2007, and claims that the government is investigating NABI for possible criminal violations relating to the classification of its imports. Our decision expresses no view whatsoever on these contentions. They are not part of the record before us, and we refuse to speculate as to the potential outcome of any ongoing investigations. Our decision tenders no general assessment on NABI's past, current, or future conduct. We hold only that on the record in this case, the district court properly granted the defendants' motions to dismiss and for summary judgment. The district court's judgment is therefore

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1773
(1:02-cv-03084-JFM)

UNITED STATES OF AMERICA,
ex rel. Thornton G. Sanders,

Plaintiff-Appellant,

v.

NORTH AMERICAN BUS INDUSTRIES, INCORPORATED; DELOITTE & TOUCHE USA, LLP; NORTH AMERICAN BUS INDUSTRIES KFT.,

Defendants-Appellees.

and

NORTH AMERICAN BUS INDUSTRIES, RT.; AMERICAN IKARUS; PETER Z. RONA; THE FIRST HUNGARY FUND,

Defendants.

TAXPAYERS AGAINST FRAUD EDUCATION FUND,

Amicus Supporting Appellant.

ORDER

(Filed Oct. 30, 2008)

Upon consideration of appellant's motion to take judicial notice of affidavit, the Court denies the motion.

For the Court

/s/ Patricia S. Connor
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
J. FREDERICK MOTZ
UNITED STATES
DISTRICT JUDGE

101 WEST LOMBARD STREET
BALTIMORE, MARYLAND
21201
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June 25, 2007

Memo to Counsel Re: Sanders v. North American Bus Industries
Civil No. JFM-02-3084

Dear Counsel:

I have reviewed the memoranda submitted in connection with defendant's motion for summary judgment as to count I. The motion is granted.

It is undisputed that plaintiffs' claim concerning the 121 buses that were sold to Miami Metro Dade, Maryland MTA, and WMATA arose more than six years before the filing of the complaint in this action. Therefore, the sole question presented by defendant's motion is whether the six-year limitations period established by 31 U.S.C. §3731(b)(1), or the ten-year limitations period established by 31 U.S.C. §3731(b)(2), applies in a case brought by a relator in which the Government decides not to intervene. As you know, by a letter ruling dated December 19, 2005 I held (in connection with a claim asserted by plaintiffs against Deloitte & Touche) that the six-year limitations period applies in such a case. However,

since the time I rendered that decision, Judge Lamberth has held the ten-year limitations period applies in all False Claims Act cases, whether or not the Government has brought or chosen to intervene in the action. *United States ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 474 F. Supp. 2d 75 (D.D.C. 2007).

Although Judge Lamberth's opinion is well considered, I remain of the view I previously expressed. This view is in line with the greater weight of authority that follows the approach established by *United States ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd.*, 6 F. Supp. 2d 263 (S.D.N.Y. 1998) and *United States ex rel. El Amin v. George Washington University*, 26 F. Supp 2d 162 (D.D.C. 1998). Judge Lamberth's opinion in *Pogue* resuscitates *United States ex rel. Colunga v. Hercules, Inc.*, 1998 U.S. Dist. LEXIS 21811, NO. 89-cv-954B (D. Utah Mar. 6, 1998, a decision that was buried by the Tenth Circuit in *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F. 3d 702 (10th Cir. 2006)). Furthermore, I find that the *Thistlethwaite/El Amin* approach is consistent both with the language of § 3731(b)(2) and, unlike the *Pogue/Colunga* approach, the section's legislative history.

As for the statutory language, it is true, as Judge Lamberth points out, that section 3731(b)(2) is not expressly limited to cases which are brought by the Government or in which the Government chooses to intervene. However, I continue to believe (as I stated in my December 19, 2005 letter ruling), that the

reference in § 3731(b)(2) to the knowledge or imputed knowledge of an "official of the United States" is sufficient to demonstrate that when enacting §3731(b)(2), Congress contemplated that the section applies only in such suits. After all, it is only where the Government itself is actively pursuing the litigation that the knowledge or imputed knowledge of a Government official may fairly be said to be material to the issue of whether an extended limitations period should apply. The Senate report on the 1986 False Claims Act amendment, which added §§(b)(2) to §3731, confirms that this is what Congress envisioned. The report expressly stated that the purpose of the new section was to "permit the Government to bring an action within" the extended limitations period. S.Rep No. 345, 99th Cong., 2d Asses., 15 (July 28, 2986), reprinted in 1986 U.S.C.C.A.N. 5266.

In *Pogue* Judge Lamberth observed that the *Thistlethwaite/El Amin* approach enables the Government to determine what limitations period applies by deciding whether or not to intervene in the relator's action. 474 F. Supp. 2d at 88. Judge Lamberth went on to express a concern that this would be a "vexing scenario." *Id.* I do not share this concern. The *Pogue/Colunga* approach would enable a relator to benefit from a ten-year limitations period if he or she decided not to advise the Government of a potential False Claims Act claim until seven years after it arises. As a general proposition, a ten-year statute of limitations for private litigants is quite exceptional; the six-year limitations period set forth in §3731(b)(1)

is much more in accordance with the norm of American jurisprudence. With this premise in mind, it is reasonable, rather than "vexing," to construe section 3731(b)(2) as authorizing the Government to determine the applicable limitations period when deciding whether or not to intervene in a relator action. After all, the Government is the victim of a False Claims Act violation. Moreover, in its sovereign capacity, when making its intervention decision, the Government can appropriately determine whether the important policy interest in providing repose to a putative wrongdoer is outweighed by other factors, such as the flagrancy of the alleged misconduct or the amount of loss to the public fisc.

I am entering herewith a separate order granting defendant's motion for summary judgment as to count I.

Despite the informal nature of this letter, it should be flagged as an opinion and docketed as an order.

Very truly yours,

/s/

J. Frederick Motz
United States District Judge

2007 WL 80922 (D.Md.)

United States District Court,
D. Maryland.
UNITED STATES of America, ex rel.
Thornton G. **SANDERS**
v.
NORTH AMERICAN BUS INDUSTRIES, INC., et al.
Civil No. JFM-02-3084.

Jan. 3, 2007.

Joseph A. Black, Daniel Eric Cohen, The Cullen Law Firm PLLC, Mark Scott London, London and Mead, Washington, DC, for Thornton G. Sanders.

Mark I. Bailen, Melissa H. Maxman, Baker and Hostetler, Washington, DC, Andrew Jay Graham, James P. Ulwick, Kramon and Graham, PA, Baltimore, MD, for North American Bus Industries, Inc.

ORDER

J. FREDERICK MOTZ, United States District Judge.

For the reasons stated in the accompanying memorandum to counsel, it is, this 3rd day of January 2007.

ORDERED

1. Plaintiff's motion for summary judgment is denied;

2. Defendant's motion for summary judgment is granted in part and denied in part;

3. Defendant's motion is denied as to count I relating to the 121 buses that were sold to Miami Metro Dade, Maryland MTA, and WMATA;

4. Defendant's motion is granted as to counts II and III and judgment is entered in favor of defendant against plaintiff as to those counts; and

4. Defendant's motion is denied as to count IV.

Memo To Counsel Re: *United States of America, ex rel. Thornton G. Sanders v. North American Bus Industries, Inc.*

Dear Counsel:

As I indicated at the conclusion of the hearing held on December 8, 2006, my schedule unfortunately does not permit me to write an extensive opinion. Instead, I am issuing this memorandum opinion, stating my rulings and the reasons for them. I hope you understand that the form of my opinion does not reflect that I have not taken your arguments seriously.[1]

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[1] On December 20, 2006, counsel for the United States wrote a letter requesting that I delay my decision until February 1, 2007, in order to give the United States an opportunity to reconsider its decision not to intervene in this action. The United States' request is denied. This action has been pending since 2002, and the United States has twice been invited to intervene and has twice declined to do so. The United States

(Continued on following page)

Defendant's motion for summary judgment will be granted in part and denied in part. Plaintiff's motion for summary judgment will be denied.

I. *Count I*

Plaintiff's "Buy America" claims asserted in count I are based upon the contention that NABI's payments to NABI Hungary for Engineering and Technology ("E & T") services were provided "in sham contracts designed to disguise the true purpose of these payments, i.e., to enable NABI to qualify for the federal subsidy and to shift taxable income to the parent company in Hungary." (Relator Sanders' Mem. of Law in Supp. of Cross Mot. for Partial Summ. J. as to Liability on Counts I, II, III, & IV of his Second Am. Compl. and Sanders' Opp'n to Def.'s Mot. for Summ. J. at 28 [hereinafter Pl.'s Mot. for Summ. J.]).[2] I am satisfied that genuine issues of fact exist as to

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received copies of all the electronic filings in this case, including the memoranda submitted in connection with parties' cross-motions for summary judgment. While the motions were pending, the United States made no effort to intervene, and it chose not to attend the hearing held on December 8, 2006. Under these circumstances, the time has come for this court to rule without hearing from the United States.

[2] Plaintiff now limits his Buy American claims to a total of 121 buses that were sold to Miami Metro Dade, Maryland MTA, and WMATA. Plaintiff thereby acknowledges that even if the cost of the E & T services were added to the buses sold to other entities, the requirement under the Buy America Act that 60% or more of the component value of the buses be of United States origin would have been met.

whether the services for which the payments were made were fictitious. Accordingly, both parties' summary judgment motions as to count I are denied.

> I also understand that plaintiff is abandoning his claims that (1) defendant made a false statement with respect to the CompoBus body, and (2) defendant made a false statement with regard to the articulated joint assembly.

However, as defendant argues, there is no evidence in the record that any other company would have sold the buses for any less than defendant charged or that the purchasers did not receive the buses for which they contracted. Therefore, under *Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 923 (4th Cir.2003), plaintiff has no claim for actual damages. On the other hand, *Harrison* also makes clear that the incurring of actual damages is not a requirement for a claim under the False Claims Act. *Id.* at 75 n. 7. If a false statement caused the United States to pay out money, a False Claims Act claim will lie even if the United States did not suffer actual damages. Under those circumstances, the defendant would be liable only for the civil penalties imposed by the Act, *see* 31 U.S.C. § 3729(a).

II. *Counts II and III*

The gravamen of plaintiff's claims in counts II and III is that defendant obtained a refund of customs duties and, after the refund was obtained,

avoided further customs duties by falsely stating that certain component parts were permanently installed on the frames of the buses being imported from Hungary. Defendant contends, *inter alia,* that any misstatements concerning alleged permanent installation were immaterial because even if the components had not been permanently installed, the imported items would have been classified as "unfinished buses" (that were free from customs duties) rather than "bus shells" (to which a 4% customs duty applied).[3]

Plaintiff argues that the very fact that false statements were made demonstrates that they were material. The obvious conceptual fallacy in this argument is that it necessarily conflates the element of materiality with the elements of inaccuracy and scienter. If plaintiff's argument were accepted, the very fact that false statements were knowingly made would mean that they were material despite the well established law that falsity, scienter, and materiality are separate elements of a False Claims Act claim. *See Harrison v. Westinghouse Savannah River Co.,* 352 F.3d at 913. Plaintiff further argues, however, that *Harrison* supports his position because it holds that the element of materiality requires only that the alleged false statements have "a natural tendency to

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[3] Defendant also argues that plaintiff's proof of scienter is insufficient to withstand defendant's summary judgment motion. I need not reach that issue because I find that the alleged misstatements were not material.

influence or [are] capable of influencing the government's funding decision[.]" *Id.* at 917. According to plaintiff, the critical issue is "whether the [alleged] false statements *could* have affected [the] Customs decision." (Pl.'s Mot. for Summ. J. at 19). Even accepting this formulation as accurate, I would find that the Customs decision could not have been affected by the alleged false statements relating to permanent installation because the decision would have been the same whether or not the components had been permanently installed. I note, however, that in my judgment a more precise formulation of the proper inquiry is whether, even in the absence of permanently installed components, Customs still would have classified the NABI imports as unfinished buses rather than bus shells.

The summary judgment record makes clear that the answer to this inquiry is "yes." Under a 1993 Customs ruling concerning the classification of trolley bus shells being imported into the United States from Canada, (cited by Damon B. Pike, the customs broker who submitted the protest letter for NABI), the critical question is whether imported items had "the essential character of public transport vehicles" at the time they were imported. Customs Priv. Ltr. Rul. N.Y. 802788 (Feb. 24, 1993). This depends upon whether the shell had been shaped into the form of a public transportation vehicle and whether important components were present at the time of importation. Plaintiff acknowledges that this is the appropriate inquiry: "[f]or classification purposes, it does not

matter if any of the components were permanently installed. A bus that is imported with all of its components, but completely disassembled, would still be classified as a bus." (Pl.'s Mot. for Summ. J. at 14.) Moreover, it is undisputed that the imported frames were in the shape of buses, and the evidence in the summary judgment record makes clear that important component parts were present when the frames were imported. Plaintiff's own industry expert, Richard Cooper, who was NABI's vice president of engineering at the time the protest letter was written, supports this assessment in his declaration and deposition testimony. (Cooper Decl. ¶ 10, Ex. E of Pl.'s Mot. for Summ. J.; Cooper Dep. 118:15-119:18, Ex. 6 of D.'s Mot. for Summ. J.))[4]

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[4] Defendant has presented the testimony of Stuart P. Seidel, who previously served as "an attorney, supervisory attorney, and Senior Executive with the United States Customs Service" and who has 37 years of experience in customs and international trade, to support its position that the alleged false statements were immaterial. (Seidel Dep. at 1, Ex. 2 of Def.'s Mot. for Sum. J.) Plaintiff challenges the qualifications of Mr. Seidel, arguing that because he "is qualified as a Customs legal expert and not as an industry expert, he should have no role in assisting this or any Court in determining the common or commercial meaning [of] the terms of the tariff schedule."(Pl.'s Mot. for Summ. J. at 20). I find this argument unpersuasive. However, even if Mr. Seidel's testimony is disregarded, for the reasons I have stated, the summary judgment record is clear that the alleged false statements were not material.

III. *Count IV*

In count IV plaintiff claims that by declaring only the contract prices and not the allegedly fictitious cost for E & T services, defendant underpaid Customs duties. This claim is unavailing as to the buses that were the subject of defendant's successful protest to Customs and to buses imported thereafter because "unfinished buses" are not subject to any Customs duty regardless of their price. Plaintiff asserts in his reply brief, however, that "the ruling on the protest only provided duty-free treatment for entries of bus shells with the date of April 12, 1997 or later. NABI is required to pay duties on all bus shells before that date." (Pl.'s Rep. Mem. in Supp. of Pl.'s Cross Mot. for Summ. J. at 13). Defendant has not responded to this argument in writing, and the record is unclear as to what buses (if any) were imported prior to April 12, 1997, or whether other issues are presented as to any such buses. Under the circumstances, I will deny defendant's motion for summary judgment as to count IV but permit defendant to file another summary judgment motion as to that count if it chooses to do so.

Despite the informal nature of this letter, it should be flagged as an opinion and docketed as an order.

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
J. FREDERICK MOTZ
UNITED STATES
DISTRICT JUDGE

101 WEST LOMBARD STREET
BALTIMORE, MARYLAND 21201
(410) 962-0782
(410) 962-2698 FAX

December 19, 2005

Memo To Counsel Re: U.S. ex rel. Thornton G. Sanders v. North American Bus Industries, Inc.
Civil No. JFM-02-3084

Dear Counsel:

Although I went into the hearing last Friday expecting to give a brief oral opinion after considering your oral arguments, by the conclusion of the hearing plaintiffs arguments had sufficiently unsettled my thinking that I was not comfortable with ruling without further reflection. I have now decided, however, that the tentative opinions I expressed at the beginning of the hearing were correct. Therefore, in order to prevent unnecessary further delay in this litigation I am prepared to rule without requiring the additional briefing I requested.

As to the service issue, plaintiff may well be correct that it has proffered (and could prove) a good faith effort to effect service on NABI Rt. by serving process on Andras Racz, the chief executive officer of NABI, Rt., when he was in Alabama. I nevertheless am of the view that service under Maryland Rule 2-121(c) would be inappropriate. I

have always understood that rule to be one of last resort, to be used only when all other means to effect service have been futile. Here, another means to effect service expressly contemplated by Fed. R. Civ. P. 4(f)(1) remains available to plaintiff. While I recognize that requiring service under the Hague Convention will further delay these proceedings, such delay is required by the Convention itself. Moreover, from the perspective of the efficient administration of justice, the delay that will occur is outweighed by the fact that were I to order service under Maryland Rule 2-121(c), I would be making a ruling which, if reversed on appeal, would be entirely disruptive of the litigation process.

As to the limitations issue raised by Deloitte & Touche, I continue to hold (or perhaps, more accurately, have reverted to) the tentative view I expressed at the outset of the hearing that the *Thistlethwaite* or *ElAmin* approach to interpreting 31 U.S.C. §3731 is correct. *See United States ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd.*, 6 F. Supp. 2d 263, 265 (S.D.N.Y. 1998); *United States ex rel. El Amin v. George Washington Univ.*, 26 F. Supp. 2d 162, 172-73 (D.D.C. 1998). I believe that courts have properly rejected the holding in *United States ex rel. Colunga v. Hercules, Inc.*, No. 89-CV-954, 1998 W.L. 310481 (D. Utah Mar. 6, 1998), because the approach taken by the *Colunga* court might, in a given case, undermine the public policy of encouraging prompt disclosure of fraud by relators to the government. *See United States ex rel. Downy v.*

Corning, Inc., 118 F. Supp. 2d 1160, 1170 (D.N.M. 2000). Likewise, I find the approach taken in *United States ex rel. Hyatt v. Northrop Corp.*, 91 F. 3d 1211, 1214-18 (9th. Cir. 1996), to be unacceptable because that approach requires that the phrase "official of the United States" be construed as including private citizens. To me, such a construction violates common sense.

The *Thistlethwaite/ElAmin* approach, on the other hand, is fully consistent with sound public policy and does little (if any) violence to the statutory language. I recognize that section 3731(b) begins with the words "[a] civil action," drawing no distinction between actions in which the government intervenes and those in which it does not. Thus, there can be no question that the primary limitations period established by section 3731(b)(1) applies to all actions, regardless of whether the government intervenes. However, in my view it is entirely reasonable to infer that the distinction is a necessary one in considering the extended limitations period provided by section 3731(b)(2) because the knowledge or imputed knowledge of an "official of the United States" is material only in actions in which the government chooses to intervene. Thus interpreted, the statute makes perfect sense, requiring false claims actions to be brought within six years, whether or not the government intervenes, but providing an extended period of up to ten years if an official of the United States learns of the alleged fraud for the first time more than three years after the fraud occurred.

In light of my rulings, the briefing schedule I set at the conclusion of the hearing is rescinded as moot, and the time is ripe to hold a scheduling conference. The conference will be held at 10:00 a.m. on January 20, 2006.

Please bring your calendar with you to the conference. If any of you would prefer to hold the conference by conference call, please call my chambers to make the necessary arrangements.

The conference will be held in my chambers located in Room 510 on the fifth floor of the Courthouse.

Despite the informal nature of this letter, it should be flagged as an opinion and docketed as an order.

Very truly yours,

/s/

J. Frederick Motz
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
J. FREDERICK MOTZ
UNITED STATES
DISTRICT JUDGE

101 WEST LOMBARD STREET
BALTIMORE, MARYLAND 21201
(410) 962-0782
(410) 962-2698 FAX

March 7, 2005

Memo To Counsel Re: U.S. ex rel. Thornton G. Sanders v. North American Bus Industries, Inc.
Civil No. JFM-02-3084

Dear Counsel:

I have reviewed the memoranda submitted in connection with defendant's motion to dismiss. The motion is denied without prejudice to defendant rearguing the issues it has raised by way of a motion for summary judgment at the conclusion of discovery.

Briefly stated, the reasons for my ruling are as follows:

1. It appears to me that the claim asserted in count II is a traditional FCA claim rather than a "reverse FCA claim." Defendant allegedly made false statements in order to induce the government to pay a claim for refund of customs duties. As to defendant's contention that the imposition of a customs duty requires the exercise of discretion by customs officials, I am not persuaded by the present briefing that this is so insofar as regular import duties are concerned.

2. Counts III and IV do assert "reverse FCA claims." I am persuaded, however, that the claims are the equivalent of an action debt at common law and are therefore maintainable. *See Am. Textile Mfrs. Inst., Inc. v. The Limited, Inc.*, 190 F.3d 729, 736 (6th Cir. 1999). I recognize that when defendant made the allegedly false statements upon which count III is based, the defendant did not then "owe [ ] to the government an obligation sufficiently certain to give rise to an action of debt at common law." *Id.* However, plaintiff alleges that defendant reaffirmed these false statements by certifying that the buses were properly classified at the time each subsequent shipment was imported into the United States. This appears to be sufficient for the purpose of establishing a reverse FCA claim.

It appears to me that plaintiff did far more than make generalized allegations of mischarging and that his conduct was "protected activity" sufficient to give rise to an action for wrongful termination. *Compare Zahodnick v. IBM*, 135 F.3d 911 (4th Cir. 1997). However, any wrongful termination claim might well be time barred. As you know, the Supreme Court has granted *certiorari* in *Wilson v. Graham County Soil & Water Conservation District*, 367 F.3d 245 (4th Cir. 2004), *cert granted*, 125 S.Ct. 823 (Jan. 7, 2005), to answer the question "whether the six year limitation period set out in 31 U.S.C. §3731(b) should be applied to retaliatory discharge actions under the False Claims Act or whether courts should apply the most closely analogous state limitation period." If the

Supreme Court holds that the state limitation period is applicable, plaintiff's retaliatory discharge claim certainly is time-barred since the most closely analogous Maryland limitations period is three years. Moreover, it is not clear that plaintiff's claim is timely even if the limitations period set forth in 31 U.S.C. §3731(b) applies, since that claim, which was not added until the amended complaint was filed, relates back to the filing of the original complaint. All of this said, I am not persuaded that permitting the retaliatory discharge claim to proceed will substantially broaden the scope of discovery, and I do not want this litigation delayed pending the Supreme Court's decision in *Wilson*.

4. I am fully satisfied that plaintiff's allegations are sufficient to meet the particularity requirements of Fed. R. Civ. P. 9(b).

Despite the informal nature of this ruling, it shall constitute an Order of Court, and the Clerk is directed to docket it accordingly.

Very truly yours,

/s/

J. Frederick Motz
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1773
(1:02-cv-03084-JFM)

UNITED STATES OF AMERICA, ex rel.
Thornton G. Sanders

Plaintiff-Appellant

v.

NORTH AMERICAN BUS INDUSTRIES, INCORPORATED; DELOITTE & TOUCHE USA, LLP; NORTH AMERICAN BUS INDUSTRIES KFT.

Defendants-Appellees

and

NORTH AMERICAN BUS INDUSTRIES, RT.; AMERICAN IKARUS; PETER Z. RONA; THE FIRST HUNGARY FUND

Defendants

- - - - - - - - - - - - - - - - - - -

TAXPAYERS AGAINST FRAUD EDUCATION FUND

Amicus Supporting Appellant

ORDER

(Filed Jan. 7, 2009)

The petition for rehearing en banc was circulated to the full Court. No poll was requested. The Court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Conner, Clerk

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3729. False claims

(a) Liability for certain acts. Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that –

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

* * *

(b) Knowing and knowingly defined. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information –

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

* * *

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§ 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

* * *

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§ 3731. False claims procedure

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title [31 USCS § 3730] may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought –

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

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§ 3732. False claims jurisdiction

(a) Actions under section 3730. Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) Claims under state law. The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT

(Filed Jul. 31, 2008)

CASE NUMBER: MAG 08 133

In the Matter of the Search of

THE PREMISES KNOWN AND DESCRIBED AS:

NORTH AMERICAN BUS INDUSTRIES (NABI),
106 NATIONAL DRIVE, ANNISTON, ALABAMA 36207

I Special Agent Cari Arn being duly sworn depose and say:

I am a Senior Special Agent with the Department of Homeland Security, Immigration and Customs Enforcement (ICE), and have reason to believe that on the premises known as

NORTH AMERICAN BUS INDUSTRIES (NABI),
106 NATIONAL DRIVE, ANNISTON, ALABAMA 36207
FURTHER AND MORE PARTICULARLY DESCRIBED IN ATTACHMENT A, INCORPORATED BY REFERENCE AS THOUGH FULLY SET OUT HEREIN,

located in the Northern District of Alabama, there is now concealed certain property, namely:

See ATTACHMENT B - ITEMS TO BE SEIZED

which is evidence of crimes, in violation of Title 18, United States Code, Sections 541, 542, 545, and 1001. The facts to support the issuance of a Search Warrant are as follows:

See ATTACHMENT C - AFFIDAVIT

Continued on the attached sheet and made a part hereof. YES

/s/ Cari Arn
Signature of Affiant

Sworn to before me, and subscribed in my presence, at 9:00 a.m. Birmingham, Alabama, this the 31 day of July, 2008.

ROBERT R. ARMSTRONG, JR.
United States Magistrate Judge
Name and Title of Judicial Officer

/s/ R. R. Armstrong
Signature of Judicial Officer

Attachment A

Description of Property and Location

NABI, Inc.'s headquarters and manufacturing facilities are located at 106 National Dr, Anniston, AL. The facilities are located on approximately 35 acre site, with two points of ingress/egress, a Main (West) Gate

and East Gate both with security guard identification check points.

The facilities include two bus assembly plants, and a research and development center. The office buildings include the executive offices, accounting, purchasing, shipping and receiving, quality assurance and (document) archives. There are numerous outbuildings associated with the production plants to include maintenance department, engineering department, partial production, proto type section and seat storage.

[Picture Omitted In Printing]

Attachment B
Items to be seized

All documents pertaining to the purchase of, payment for and sale of imported merchandise, including, but not limited to:

a. Purchase Orders

b. Contracts

c. Seller's confirmation and any revision thereto

d. Copies of all pertinent negotiable instruments

e. Invoices

f. Delivery Contracts

g. Engineering and Technology Contracts

h. Bank statements

i. Inventory records

j. Photographs

k. Letters of Credit

l. Wire transfers

m. All pertinent

Correspondence

Facsimile

Electronic transmittal

Records of conversation

Records and documents reflecting information regarding additional costs or expenses incurred in the transactions including:

a. Packing lists

b. Commissions paid

c. Assists

d. Proceeds that accrue to the seller

Copies of all original documents pertaining to the shipment, transportation and sale of buses, bus shells, bus parts and components into the United States, including but not limited to:

a. Entry documents

b. Invoices

c. Bills of Lading

d. Packing lists

e. Photographs

f. Specifications

g. Correspondence

h. Electronic transmittals

Descriptive or illustrative literature explaining:

a. what the merchandise is

b. where the merchandise is used

c. how the merehandise is used

d. specifications

Accounting records, journals, and/or financial statements pertaining to the merchandise, including, but not limited to:

a. General Ledgers

b. Case disbursement journals

c. Purchase journals

d. Accounts receivable ledgers

e. Accounts payable ledgers

f. Cancelled checks

g. Cash receipts journals

Records of the intended final purchaser of the goods imported

a. sales contracts

b. purchase orders

c. delivery contracts

d. engineering and technology contracts

Any and all corporate records including but not limited to:

a. Articles of Incorporation

b. Corporate binders and minutes

c. Stock binders and stock certificates

d. Corporate officers and affiliated companies

Any electronic storage media, including but not limited to microfiche computer disks, tapes and software, equipment hard drives, tapes, tape drives, printouts, optical storage or CD read/write disks, and any computer peripherals which are used to facilitate the importation, sale, distribution, transportation, ordering and purchasing of buses, bus shells, bus components which are evidence of violation of Title 18, United States Code, Sections 541, 542, 545, 1001 and 1343.

ATTACHMENT C

AFFIDAVIT IN SUPPORT OF A SEARCH WARRANT FOR

THE PREMISES KNOWN AND DESCRIBED AS: NORTH AMERICAN BUS INDUSTRIES (NABI), 106 NATIONAL DRIVE, ANNISTON, ALABAMA 36207[1]

Personally appeared before me Cari Arn, Senior Special Agent, Department of Homeland Security, Immigration and Customs Enforcement, who being first duly sworn, deposes and states as follows:

I am a Senior Special Agent of the Department of Homeland Security, Immigration and Customs Enforcement (ICE) (formerly the Department of Treasury, United States Customs Service, Office of Investigations). I have been employed in this capacity since September of 1986. I am currently assigned as the Resident Agent in Charge (RAC) of the ICE office in Birmingham, Alabama, which is responsible for investigating violations of federal laws, including those relating to the importation of merchandise for entry into the commerce of the United States. As part of my employment with ICE, I received investigations training from the Federal Law Enforcement Training Center (FLETC) and in-service training related to fraudulent international trade practices.

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[1] NORTH AMERICAN BUS INDUSTRIES (NABI) is owned by CEREBUS [sic] Capital Management Group.

ICE Special Agents have statutory authority and are charged with the responsibility to investigate violations of laws pertaining to the entry of merchandise into the United States. This particular investigation is related to allegations of violations of Title 18, United States Code, Section 541; Title 18, United States Code, Section 542; Title 18, United States Code, Section 545; and Title 18, United States Code, Section 1001. In part, Title 18, United States Code, Section 541 prohibits the entry of any merchandise by false classification or by payment of less than duty legally due. Section 542 prohibits the entry of merchandise by means of false statements. Section 545 prohibits the introduction of merchandise into the United States by passing or attempting to pass a false document through the customhouse and Title 18, United States Code, Section 1001 false statements.

The information contained in this affidavit is based on facts from my own, personal observations, importation documentation, as well as information from other sources, interviews and other law enforcement agents.

This affidavit is in support of a warrant to search the premises of North American Bus Industries (NABI), 106 National Drive, Anniston, Alabama 36207. As noted herein, NABI is owned by Cerebus [sic].

Background:

NABI is a manufacturer and importer of commercial transportation buses sold to governmental municipalities. The foreign manufacturer called NABI Hungary produces the bus shell, which is shipped from Hungary, through Germany and imported into the Unites States at the Port of Charleston, South Carolina. The bus shell is trucked to NABI USA assembly plant in Anniston, Alabama. The procedure of initial assembling in Hungary and final assembly in the Unites States is conducted in order for governmental municipalities to comply with the federally funded Buy American Program. The Federal Transportation Administration provides funding to governmental municipalities to secure public transportation. The Buy America program requires that no more than forty percent of the final product shall be produced by any foreign manufacturers.

Harmonized Tariff Schedule:

The initial bus shell is produced in Hungary and then imported into the United States for final assembly. In accordance with Harmonized Tariff Schedule (HTS), a complete bus has a HTS 8702.10.3000 at the two percent tariff duty rate, while a bus shell uses HTS 8707.90.5040 at a four percent duty rate.

NABI Requests Customs Ruling:

In an effort to file entries at the lower tariff schedule, in June 1998, NABI requested a US Customs Headquarters Binding Ruling concerning their

importations of buses into the United States from Hungary. NABI argued under HTS General Rulings of Interpretation (GRIs) 2(a), which states in pertinent part, that: Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the "essential character" of the complete or finished article. NABI provided supporting documentation that the bus shells, when imported, contain a substantial amount of equipment and number of components necessary for the "essential character" of a completed transit bus.

Favorable Ruling Issued:

As a result of the information and documentation provided by NABI, United States Customs Service Headquarters issued favorable ruling #962065 to NABI in November 1998. The ruling concluded that if the articles consist of forty and sixty foot transit bus shells which, upon importation, have the following components permanently installed: base structure, body, axles, front suspension, rear suspension, rims, wheels, power steering, brake chamber, fuel tank, engine cradle (including the frame for installation of the engine and the fan shroud which are bolted on), flooring, partial door system including door panels, windshield, outside body trim (including the rain gutters and rub rail), corrosion protection paint, steering wheel, tracking for interior lights, air duct system and destination sign door with enclosure, then they should be classified as a complete bus under

HTS subheading 8702.10.3000, at the lower duty rate of 2% ad valorem.

The Customs and Border Protection (CBP) Importation Procedure:

When merchandise arrives from abroad to be imported into the United States, the importer, or a licensed Customhouse broker acting for the importer, is ordinarily required to make a formal entry of the goods through United States Customs. Documents ordinarily submitted to U.S. Customs for formal entries of merchandise from Hungary are (1) Customs Form 7501, Consumption Entry; (2) a commercial invoice issued by the foreign seller or manufacturer including the value; and (3) a declaration of the country of origin as a minimum. In cases where a binding ruling has been issued, the ruling is to be attached to the entry documentation.

Entry BTC-00604370:

On October 24, 2006, Donald O. Montgomery Customhouse Broker, dba Carrie International Freight Services, 215 East Bay St., Suite 201-L, Charleston, SC 29401 filed entry BTC-00604370 on behalf of NABI. CBP, Import Specialist (I/S) Team 423 conducted an examination of the entry on October 31, 2006, to verify NABI was in compliance with the headquarters ruling. The entry, which had been filed as "Completed Buses" under HTS 8702.10.3000 at 2% duty rate, was examined and determined to be missing the suspension system, power steering, brake and braking components, fuel tank, and air duct

system, all of which is required by the ruling. CBP sent NABI a Customs Form 29, Notice of Action where the entry was "Rate Advanced", which changed the classification from HTS 8702.10.3000, at 2% duty rate to HTS 8707.90.5040, at the 4% duty rate. A subsequent review of additional entries revealed NABI had imported BUS SHELLS, which were also missing some of the required components.

Entry BTC-0060519-5:

On January 23, 2007, I/S Team 423 conducted another examination of NABI entry BTC-0060519-5, dated 12/30/2006 and discovered them to be BUS SHELLS rather than "Completed Buses", because the required components were not installed. As a result of the inspection, a CBP form 29, Notice of Action, was generated to Rate Advance and collect the loss of revenue. Additional entries were identified and Rate Advanced also.

Protest 1601-07-100269:

On July 11, 2007, Customhouse Broker Donald Montgomery, dba Carrie International Freight Services, filed protest 1601-07-100269 on behalf of NABI. The protest referenced entry BTC-0060519-5, dated 12/30/2006, which had been Rate Advanced due to a change in the HTS from Complete Buses 8702.10.3000 at 2% duty rate to the Higher Bus Shells HTS 8707.90.5040, 4% duty rate. After a Protest is filed, the CBP Office of Rules and Regulations (ORR) has the responsibility to conduct further review of actions taken by the District Ports. An

importer or Customhouse broker can file a protest and request a review for classification issues, among other topics.

Entry BTC-0060969-2:

On October 29, 2007, I/S Team 423, SSA Terry Moore, SSA Bill Wooten and SSA Dante Garrido examined buses imported under entry BTC-0060969-2. The examination concluded that the axles were a used component, as identified by the rust, dents, corrosion, etc. The suspension system had only a single shock absorber and a used dummy spacer, preventing the use of the single shock. The spacer was used to prevent the bus shell sitting on top of the bus frame, preventing them from damage during transit. There were no springs, coils, air bag, air tanks or plumbing for the suspension system. There were no fuel tanks, no power steering components, no brakes or braking components, and no air ducting system present on any of the examined buses. Other components were in question as to the specifications required in the ruling. Photographs were taken of the buses.

CARTA Examination:

On October 30, 2007, the bus shells were examined by representatives of the Charleston Area Regional Transportation Authority (CARTA), who have specific industry knowledge of commercial buses. Mr. David Bonner is the Director of Maintenance for CARTA, with 20 years of experience in the commercial bus field. Mr. Patrick Cartin is the Parts Manager for

CARTA with 7 years of experience in the field. After examination of entry BTC-0060969-2, both Mr. Bonner and Mr. Cartin agreed that the buses did not have the required components listed within the Customs ruling.

Mr. Richard Cooper's review of photographs:

On November 12, 2007, Mr. Richard Cooper, who was the Vice President of Engineering from April 1996 to May 2004 examined the photographs taken on October 29, 2007 of the buses imported under entry BTC-0060969-2. As a former Chief Engineer of NABI, Mr. Cooper advised that the suspension is an "air" suspension on all buses, thus were non-existent on the bus. Only a single shock absorber was in place; however, it was made inoperable due to the dummy spacer installed. The dummy spacer is used to fill the empty space where a suspension air bag would be in placed. The spacer is required; otherwise the frame would rest on the chassis, making movement during transportation difficult and causing damage to the frame. The blue tube is a shock made inoperable because of the spacer. The spacer is recycled after use and returned to Hungary.

[Pictures Omitted In Printing]

Mr. Cooper indicated that the buses had a dummy axles and steering arms installed. The dummy axles are shipped to Hungary where they are then installed. The dummy axles are used to facilitate the buses to be transported by Roll On-Roll Off (Ro-Ro) vessels. As seen in the below photographs, the axles

and steering arm are rusted and dented, as the axles are recycled.

[Pictures Omitted In Printing]

Mr. Cooper indicated that below photos are of the Mechanical Steering gear and drag line for the manual non-power steering system.

[Pictures Omitted In Printing]

The below photographs are of the clamshell area, which is the framing for the rooftop where the compressed natural gas (CNG) tanks would be installed. The CNG tanks would sit on the "T" brackets, but the tanks are missing.

[Pictures Omitted In Printing]

Interview with Mr. Tony Sanders:

On February 11, 2008, an interview was conducted with Mr. Tony Sanders, who was employed in 1993 as the Vice President and Chief Financial Officer, and subsequently became the Chief Executive Officer of NABI USA until he was terminated in 1997. While in that position, Mr. Sanders discovered that NABI Hungary was paid by two contracts for each bus. The first contract is the Delivery Contract, which is the value of the bus shell which must meet the Buy America requirement. This is the contract used for the value of the Customs importation. The second contract is the Engineering and Technology (E&T) Contract to cover the cost of the bus shells in excess of the forty percent Buy America requirement.

NABI Hungary would purposefully calculate the maximum cost of the bus shell, to keep it under the forty percent foreign component cost. NABI USA would make separate payments to NABI Hungary to cover the delivery contract and the E&T contract costs. Engineering and Technology costs are considered "assists in the production" of the imported item and are subject to US Customs Duty. The E&T payments should have been disclosed as part of the imported cost of the bus shell. Mr. Sanders estimates the cost of the E&T payments, was approximately $3.8 million dollars, which equates to $153,528 loss of dutiable revenue. More importantly the added cost of the E&T payments would have increased the foreign costs over the 40 percent limit of the Buy American program.

Interview with Mr. Chris Finley:

On February 11, 2008, an interview was conducted with Mr. Chris Finley, 115 Timberlea Drive, Warner Robins, GA 31088. Mr. Finley was employed by NABI from March 1989 until March 2003. In his last position at NABI he was the Director of Quality Assurance (QA) and part of his duties included the inspection every bus shell imported by NABI from its parent company in Hungary. When questioned regarding his knowledge of the condition of NABI's bus shell imported from Hungary, specifically, about the components listed Customs ruling HQ 962065, Mr. Finley, indicated many bus shells were received without the required components present or the components were incomplete in accordance with the

requirements set forth in the US Customs ruling. Mr. Finley added that as part of his duties, the QA department would photograph each specific imported bus, and those photographs, along with the necessary paperwork, were maintained in the NABI QA department. Mr. Finley reviewed photographs taking during an examination of entry BTC-00609692 on October 29, 2007. Mr. Finley concurred with Mr. Cooper that the suspension system had only a single shock absorber and a used dummy spacer, which prevented the use of the single shock. There were no springs, coils, air bag, air tanks or plumbing for the suspension system. The spacer was used to prevent the bus shell sitting on top of the bus frame during transit. Mr. Finley reported that NABI used only American made fuel tanks or fuel cells in their buses. That included buses which were designed to use Liquid Natural Gas (LNG), Compressed Natural Gas (CNG) or diesel fuel.

Interview of Ms. Lisa Gardner:

On May 14, 2008, an interview was conducted with Ms. Lisa Gardner, a former NABI employee. Ms. Gardner had been employed as Corporate Secretary and Treasurer and was terminated on November 29, 2007. Her termination included a severance package and a non-compete clause; thus she was presented with a Customs Summons to provide testimony and produce relevant documents, with which she complied. Ms Gardner explained that the E&T payments were made to NABI, Hungary for the engineering services they provided. Normally there were two

contracts paid for each bus, the delivery contract and the E&T contract. The E&T payment varied between three to ten thousand dollars per bus. Ms. Gardner reported that Donald Montgomery, Carrie International Customhouse broker in Charleston, SC, was the broker for NABI. The import documents were always provided by NABI, Hungary directly to Carrie International. The bills and invoices from Carrie International were paid by Ms. Gardner for NABI, USA. Ms. Gardner indicated that NABI would "microfiche" original business documents and maintained them in the Archives building at the NABI plant. After the documents became "Microfiche", the original documents were destroyed. The documentation and photographs pertaining to the condition of the bus shell upon receipt at the Anniston plant, which is generated by the QA department, are maintained in the QA department located in the Plant One building of NABI. Documentation which includes purchase order or sales contracts, are maintained in the Purchasing offices located in Plant 3. Correspondence documentation such as Articles of Incorporation, corporate internal memorandum are maintained in the Executives Offices, also located in Plant 3. Ms. Gardner was aware that original Customs documentation must be maintained for five years after importation according to Customs regulations. Documentation pertaining to Importations is maintained in the records of the accounting office within Plant 3, or if the records are older than five years the documentation would be microfiche or scanned and

maintained in the Archives building, located on the NABI facility.

Interview of Mr. Richard Cooper:

On May 15, 2008, Mr. Richard Cooper was interviewed. Mr. Cooper was employed by North American Bus Industries, Inc. (NABI) in Anniston, AL from June 1995 through May 2004. He held the position of Vice President of Engineering from October 1995 to May 2004. As Vice President of Engineering, his principal function was to manage NABI's Engineering Department, perform product and industrial engineering related to NABI's final assembly of transit buses. He explained that when the bus shells imported from NABI, Hungary they were bare bus bodies that consisted of a steel shell (including side and roof panels) with a front windshield and all exterior access doors. The bus shell was painted with a corrosion resistant primer coat. In addition, the bus shell was imported with a rough plywood floor and a diesel fuel tank, if it was a diesel bus. The bus shells were the same for all contracts with NABI customers. When NABI purchased Ikarus it came with the purchase of the design license, blueprints, engineering plans, etc and right to build these standard high-floor models. Ikarus, was the Hungarian company from whom NABI, Hungary and NABI USA evolved. At no time during Mr. Cooper's employment did NABI, Hungary ever make or provide any original basic drawings, designs, schematics, blueprints, and bill of materials for the final assembly of buses in Alabama. The original documents were re-used during

the production, thus continual Hungarian engineering and technology services were not necessary, as they claimed. They did not provide significant engineering and technology services in connection with any final assembly to warrant additional payments from NABI USA. Mr. Cooper was questioned about some of the specific components listed in the Custom ruling 962065 and the physical status of NABI's imported bus shells. The steering system is limited mechanical steering only, not power steering. The suspension system is not present as it is an air suspension system. The fuel tanks are not present if it is LNG or CNG system. The axles, wheels and tires were not the final product installed and sold to the customer, thus the majority of imported buses cannot pass the specifications outlined in the Customs ruling.

Examination of seven bus shells:

On July 14, 2008, SSA Terry Moore and SSA Dante Garrido examined seven bus shells which had been entered by Donald O. Montgomery Customhouse Broker, Carrie International Freight Services, on behalf of NABI. The entries involved were BTC-0061310-8, BTC-0061309-0; BTC-0061260-5 and BTC-0061262-1. The bus shells which were missing the suspension system, power steering, brake and braking components, fuel tank, air duct system, and flooring, all of which is required by the ruling. The rims appeared to be new on all bus shells, while the tires were old and used on five of the seven buses shells, while two had new tires. The two with the new tires, also had bi-fold doors and a clamshell roof

which indicates the bus to be produced as a LNG or a CNG bus.

Based upon the information developed in this investigation, it is believed that NABI has provided false statements in its supporting protest, which were material to the Customs classification decision to grant their favorable ruling. NABI supplied the specific components or product which were to be included on the bus shell according to the ruling. The ruling allowed NABI to import bus shells as finished buses under HTS 8702.10.3000, at the lower duty rate of 2% ad valorem. The false statements supplied in its protest were material to Customs classification decision to allow NABI's imported bus shells as finished buses under HTS 8702.10.3000. The false statements are a violation of Title 18 USC 1001 which caused, influenced and supported the importations to be entered in violation of Title 18 USC 541, Entry of goods falsely classified; Title 18, United States Code, section 542, Entry of goods by means of false statements; and Tile 18, United States Code, Section 545, Passing of false invoices through the Customhouse. Examinations of the imported product established a continual import practice by NABI which abused the factual description and the intent of the issued binding ruling.

Based on information provided to me, it is my understanding that as a normal course of business, businesses such as NABI keep and maintain documents and records related to the manufacture, purchase, transportation, importation, and sales of

merchandise, as well as supplier documentation with the businesses with which they are involved. I also understand that such businesses tend to keep and maintain these documents and records on their business premises.

Interviews conducted with Ms. Gardner and Mr. Finley identified specific documentation which supports the continual criminal violations of Title 18, United States Code, Sections 541, 542, 545 and 1001 and has been maintained in various media formats such as paper, microfiche or scanned into a digital media and are stored at NABI, Anniston facility in Quality Assurance, Accounting, Purchasing, Archives departments and the Executive offices.

In accordance with Title 19, United States Code, Section 1508, Recordkeeping any importer who imports merchandise into, the customs territory of the United States, shall make, keep, and render for examination and inspection any records which pertain to any such activity, or to the information contained in ,the records and are normally kept in the ordinary course of business. Retention of records is to be maintained for a five year period, however; interviews established NABI maintains records longer then the five year requirement.

Based upon the facts stated herein, I submit that probable cause exists to enter the business premises known and described as North American Bus Industries (NABI), 106 National Drive, Anniston, Alabama 36207, and to search for and seize any and all

such records and documents, including computer-maintained records and documents, related to the manufacture, importation, transportation, purchase, and sale of buses and/or bus components as described in this affidavit. A more complete description of the items to be seized and the manner in which computer records are to be searched and seized is attached hereto as "ATTACHMENT B."

In consideration of the foregoing, I respectfully request that this Court issue a search warrant for North American Bus Industries (NABI), 106 National Drive, Anniston, Alabama 36207 authorizing the seizure of items described in Attachment B and incorporated by reference as if fully set forth herein. Your affiant requests authority to seize such material.

/s/ Cari Arn
Cari Arn, Senior Special Agent
United States Department of
Homeland Security
Immigration and Customs
Enforcement

Subscribed and sworn to before me this 31 day of July, 2008.

/s/ Robert R. Armstrong, Jr.
ROBERT R. ARMSTRONG, JR.
United States Magistrate Judge